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A

PRACTICAL TREATISE

ON THE LAW OF

MARINE INSURANCE.

A

PRACTICAL TREATISE

ON THE LAW OF

MARINE INSURANCE.

BY

RICHARD LOWNDES,

AUTHOR OF "THE LAW OF GENERAL AVERAGE," ETC.

SECOND EDITION

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PREFACE

TO THE SECOND EDITION.

THIS edition hardly requires a preface. The few decisions on insurance during the last four years have, of course, been worked into their places. I have profited by my critics so far as to suppress one or two disquisitions which perhaps ran out beyond what was becoming in a mere practical handbook; and, on the other hand, have in places slightly expanded what was too much compressed, and in particular have added a brief introductory explanation concerning insurable interest. I have likewise set forth more fully the decisions bearing on the maxim *causa proxima non remota spectatur*, as to which it seems to me that there is still room for some difference of opinion in several details. Lastly, I have added a chapter on Subrogation, pointing out the position of the underwriter in the cases, ever growing more frequent and important, in which he is entitled to make claims on third parties in the name of the assured. I have not found this subject treated, I may almost say at all—certainly at all adequately—in any previous work

on the law of insurance. These are the principal changes. I have endeavoured, in this as in the former edition, to make my work as short and as plain as I could, hoping it might be useful to mercantile men and students.

LIVERPOOL & LONDON CHAMBERS,
LIVERPOOL, *January*, 1885.

PREFACE

TO THE FIRST EDITION.

Some knowledge of the law of Marine Insurance is almost indispensable to a shipowner or merchant, and it is important that that knowledge should be correct so far as it goes. It is true that most shipowners and many merchants sooner or later acquire some such knowledge without the trouble of reading books, from their own experience; but this method of acquiring it is apt to be costly, as the most valuable part of the experience is derived from the consequences of their own mistakes. Hence there has always been a demand for little books like the present, and there has generally been a supply. Stevens on Average, Baily on General Average and the Perils of the Seas, and Hopkins's Handbook of Average and Manual of Marine Insurance, are examples of the kind. All these, like the present volume, were written by average-adjusters,—a class of persons whose peculiar experience gives them great opportunities of at least knowing what is wanted.

All these books, however, like law-books on a larger scale, must either be constantly kept up to the level of the latest decisions, or they run the risk of ceasing to be safe guides to the mercantile reader, on account of the rapid growth of law and consequent change of practice. The time seems to have come for something new.

In these pages I have endeavoured to put in few words, and in as plain language as I could use, such matters relating to the law of Marine Insurance as I thought a merchant or ship-owner ought either to know or have within easy reach. I have taken the opportunity of discussing here and there some questions of principle as to which the law does not seem perfectly clear, but my main object has always been, to write something which might be serviceable to a mercantile reader, —to those who have not leisure to study the great work of Arnould.

I must be allowed here to express my sense of the great obligation I am under to Mr. Arthur Cohen, Q.C., M.P., who in the midst of his laborious occupations has found time to read through my proof sheets, and to give me many valuable suggestions and criticisms. I hope this service, on the part of so well-known a master of this branch of law, may be taken as a guarantee that there will be found in these pages no serious misstatement as to what the law is; though, if there should be, the fault and the responsibility must lie with me.

I have also to acknowledge obligations to several friends who have in one way or another aided me in this book; and in a high degree to my relation, Mr. William S. Byrth, of the Middle Temple.

LIVERPOOL AND LONDON CHAMBERS,
LIVERPOOL, *December*, 1880.

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INTRODUCTION.

MARINE INSURANCE may be called a contrivance for division of labour. Whereas a merchant or shipowner has to study the markets all over the world to find profitable employment for his ship or sale for his merchandize, and is liable withal to have his calculations baffled at any moment by the uncertain accidents of the seas, insurance relieves him of this latter disturbing element in return for a fixed payment, which may be computed beforehand. Thus the risks of the sea and the risks of the market are made two distinct objects of study. The insurer (or underwriter), concentrating his attention on the statistics of shipwreck and disaster, and the accurate appraisement of the several risks, according to the voyage, season, character of the ship, or kind of cargo, learns to minimize and apportion the premiums he asks, so as to hold his own against competition, yet make a fair profit, and by a judicious spreading of his ventures make it with tolerable certainty. The merchant, on his part, relieved from all care as to the perils of the seas, and needing no reserve fund on that account, can trade on a smaller capital, work out his calculations of required gains with greater nicety, and so be content with a smaller but more certain profit on each transaction. The door of competition is thus opened to persons of slenderer means, who might otherwise be beaten out by great capitalists or companies ; and hereby there is a third that gains, and that largely, and all over the world, namely, the consumer; since insurance in several ways tends to lower market prices, and keep them steady.

Purpose of marine insurance.

b 2

Tests of any system of insurance law.

Insurance, then, being a contrivance for a specific purpose, a law or body of rules concerning it must, one would think, approximate to its perfection in proportion as it carries out this purpose more completely. For this, the first condition is that these two functions, the study of sea-risks and the study of markets, shall be kept distinct from one another, so that each may be in the hands best fitted for it; in other words, that the fluctuations of the market shall be as nearly as possible immaterial to the insurer, and the accidents of the sea as nearly as possible immaterial to the assured. Next in importance is the condition that this shall be done economically; which implies, that the law shall secure for the underwriter, at the time of insuring, such knowledge of the real nature of the risk, and, when his turn comes to pay, a liability so graduated to the amount on which he has received his premium, and to the conditions of his contract, that he can afford to ask no more than a fair price for his risk, needing no surcharge to indemnify him against possible deception or uncertainty. The touchstone of a good system of insurance law is its fulfilling these two conditions.

Usage.

But to determine the best way of combining these two conditions, so as to produce a really good system, is a problem not altogether of pure reasoning, but one that requires for its solution the aid of experience. The results of experience come before Courts of law under the form of mercantile usages. The manner in which reasoning and usage have been and are to be brought into combination for the purpose, may, perhaps, be made somewhat clearer by a slight sketch of the history of marine insurance.

Origin of insurance.

Marine insurance, invented probably by Jews, but first brought into general use by Italian merchants, has now existed from six to seven hundred years (*a*). Of the

(*a*) In what is here set down concerning the antiquities of the law of insurance, I have chiefly followed M. Pardessus, whose unrivalled collection of maritime laws, with the Dissertations which introdnce and

first three or four hundred of these we know, beyond the fact of its existence and gradual extension, absolutely nothing; the manner of its growth is not recorded. At the end of that time its usages, such as they had then come to be, began to be written down. A century later, the force of law began to be given to these usages, by means of codes. This process was carried on in Europe for about a century before it reached England, when Lord Mansfield virtually laid the foundations of our own law of insurance. From Lord Mansfield's time to the present day is again only about a century,—so that the English case-law forms, in point of duration, a small fraction only in the growth of this branch of the law merchant. But it is by far the most valuable portion. "If a perfect system of the law of insurance," says a distinguished American jurist, "in all its extent and in all its branches, shall ever be constructed, the judicial decisions" [of England and the United States] "will be found to supply its most extensive and choicest materials, and it is principally from the English Reports that these materials must be drawn" (*b*).

Those first unrecorded 350 years (or thereabouts), however, were perhaps in reality the most important of all, since in these the contract of insurance, we know not after how many internal conflicts, took a shape essentially the same, at least in outline, as that it still retains. The first period.

We cannot place the origin of this invention much later than the first half of the 13th century, and there are good reasons for carrying it half a century further back. Villani, the Florentine historian, who died in 1348, informs us that it was devised by the Jews, upon occasion of their expulsion from France about A.D. 1182, to facilitate the removal of

connect them, have as yet hardly been studied, at least by English writers on the law of insurance, so much as they deserve. It is not too much to say that the historical Introductions of Park, Marshall, and even Duer and Phillips, are completely antiquated by this great work.

(*b*) 1 Duer, Ins. 52.

their property from that kingdom ; a story which, as Duer justly points out, even if not true, proves at least that when Villani wrote, the origin of insurance was old enough to have been forgotten (*c*). The oldest mention of insurance in any public ordinance is in that of Pisa, dated 1318 (*d*). Insurance is alluded to by two Florentine writers early in the 14th century (*e*), and there is mention of it in Venetian public documents of A.D. 1411 (*f*) and 1468 (*g*). These are the earliest traces; and from this point to the publication of the *Guidon de la Mer*, between A.D. 1556 and 1584, it may be stated generally that while we find ample proof of the existence and extension of marine insurance, there is little or nothing to show by what laws or rules it was governed.

The maritime commerce of Europe during this period, though of course not to be measured by a modern standard, was in extent by no means despicable. It includes that important trade between East and West—a trade carried on by means of caravans across the desert and ships through the Mediterranean, connecting Egypt, Persia, India, and even China, with Italy, Spain, France, England, Flanders, and as far as the Baltic—which sprung up after the Crusades, and which, by the taste for luxuries and refinements it introduced, changed the face of Western

(*c*) 1 Duer, 28, 31. M. Pardessus substantially agrees with Judge Duer as to the probable antiquity of this invention. (4 Pard. 567.)

(*d*) 4 Pard. 566. M. Pardessus, who, in one of his earlier volumes, had thrown doubt on a statement in a work called the "Chronicle of Flanders," that insurance was known at Bruges in 1310, afterwards retracts this doubt. Considering, he says, that, as it is impossible to question, a document of 1318 proves that insurance was known at Pisa ; that it is named in the work of Pegoletti relative to the commerce of Pisa composed in the first half of the 14th century ; and that Uzzano, in his Treatise on Commerce, composèd in 1400, speaks expressly of insurances made in Florence for London and "for Bruges ;" it is likely that the "Chronicle of Flanders" may in this matter be founded on trustworthy tradition, and be worthy of credit. (4 Pard. 567.)

(*e*) 4 Pard. 567.

(*f*) Hopkins, Manual of Insurance, 19—22.

(*g*) 5 Pard. 65.

Europe. It includes the great age of the Italian republics, when Florence was the seat of important manufactures, and, with Venice and Genoa, became the carriers of Europe. And lastly, it includes at least the beginnings of the ocean traffic which followed the doubling of the Cape of Good Hope and the discovery of America. During this period ships began to be made larger; from the little barks of Columbus we come to the galleons of Philip II. During this period occurred likewise a change in the mode of conducting sea-traffic, which may be termed the beginning of the modern commercial system ; namely, that merchants gradually left off sailing, as the primitive practice had been, from port to port with their wares. Italian merchants, becoming magnates and sometimes princes in their little states, naturally began to live more at home, and sent clerks and agents, and at last often a single supercargo, in charge of their goods on shipboard. This necessitated the establishment of factories or branch houses in the several foreign ports they traded with; and hence we find, during this period, Lombard merchants permanently settled in London, Rouen, Bruges, and other principal seaports throughout Europe. Each of these changes must have led to modifications, more or less considerable, in the system of insuring.

Second period.

The second period, that in which these traditionary rules and methods of insurance began to be reduced to writing, dates from the latter half of the 16th century. Spain introduced it; rules for the mercantile tribunals which regulated disputes with underwriters having been drawn up—first by orders of the corporation of the city of Burgos, A.D. 1538, then by that of Bilbao in 1560. These regulations, however, prolix, obscure, incomplete, perhaps kept purposely in few hands, seem never to have obtained a wide circulation (*h*).

(*h*) There is likewise an Ordinance of Florence, A.D. 1523, which seems to come under the same category, since it, unlike the earlier Ordinances, which dealt only with matters of procedure, lays down

In France, however, about the same time, there appeared a remarkable document of a very different character. This was the "*Guidon de la Mer.*"

The Guidon.

Between the years 1556 and 1584 was printed, in the "noble city of Rouen," a small volume of about a hundred pages, by an unknown hand, with a preface which to a good many readers must have been attractive. It invites "all who put forth and traffic by sea, particularly the masters of ships, mates and pilots, and likewise those who do not themselves go to sea, but may be glad to invest their moneys in that way," to read here the "style and usance" to govern themselves by, without the need of seeking counsel elsewhere. They were to know that this volume had been drawn up by two able wealthy merchants of Rouen, for their own use and that of their friends, but not for publication: but that having been borrowed from them, and privately copied, it was now given to the public, on account of its rare value. If there were faults, it was added, these must not be set down to the printer but to the transcriber (*i*).

This volume has been called "the oldest treatise on insurance." But there are reasons for believing it to be not so properly a treatise as a body of rules intended for the governance of the Consular Court at Rouen. Such a Court, called that of "the Prior and Consuls," was introduced into that city, after a pattern then very common throughout Europe, in the year 1556, and continued to exist there until 1584, when its place was taken by a

some few principles; as, that policies must be in one specific form, that premiums must be paid in advance, that if the loss were privately known to the assured before insuring he could make no claim on his insurer, that perishable articles must be specially named in the policy, that goods on deck were not to be considered insured, and that underwriters must pay first and plead afterwards. (4 Pard. 598, *et seq.*) This, however, covers only a small part of the subject.

(*i*) 2 Pard. 373. These faults, in a later edition of 1603, the oldest M. Pardessus was able to find, were in fact so numerous that he thought it better, in his own work, to follow the modernized version of Cleirac; so that we have not the book in its original garb.

Court of Admiralty; and the references to the "Prior and Consols" in the *Guidon* prove that the book belongs to this period. This Court of the Prior and Consuls superseded an official called the Greffier, one of whose duties had heretofore been to adjudicate on claims concerning policies of insurance, reducing him to a position somewhat analogous to that of our clerk to the magistrates; and it appears a not unlikely conjecture that the Guidon was a body of rules and instructions, drawn up by an able and experienced Greffier for the guidance of his new chiefs. Some such theory would account for the curious mixture of enunciation of customs and customary rules, reasoning, and positive regulations concerning matters confessedly new, which make up the *Guidon* (*k*).

Be this as it may, we have in this book, arranged under heads with some pretence of method, if not all, at least by far the largest portion, of that which remains to us of the insurance practices of these first 350 years. Here is exhibited the condensed result of so many years of experiment, internal ferment, and growth towards maturity. We are not to think of it as the French system, or something different from the Italian, or the Spanish, or the English. Insurance, in those days, was independent of nationality. The merchant, a migratory being, was, like the Jew, a citizen of the world: his dealings were with men of every country, and he no more thought of a municipal law of insurance, one thing in Venice and

(*k*) For example, in chap. 8, art. 1, whereas the rule had formerly been that the master's statement on oath was to be accepted as proof, the Guidon, reciting the abuses this was liable to, says, "*parquoy a l'avenir lesdits maitres ne seront croyable, ni leur equipage, au simple rapport,*" and proceeds to set forth some very sensible rules for cross-questioning them in the presence of the merchants; thus at a stroke changing the system of procedure from one of affidavits to *vivâ voce* evidence. Other similar instances may be traced. That the Consuls of the various seaports of Europe had written books or codes for their official guidance, which books were jealously kept private, may be learnt from a curious account which M. Pardessus gives of such a document used by the Consuls of Pisa in the 13th century. (4 Pard. 558—560.)

another in Rouen, than of a municipal law of bottomry or general average, or municipal rules for avoiding collisions at sea.

This *Guidon,* which to us now appears an invaluable relic, preserving a whole history that would otherwise have perished unrecorded, was probably not much thought of in its own day. It was, after all, merely a record of practices which the few who at once cared to know them, and were readers of books, were already familiar with by talk with men of their own calling on exchanges or market-places. The only extant edition was full of printer's errors, and as the French language gradually changed, became more and more hard to understand. But in 1656, Cleirac, writing his treatise on the "*Us et coutumes de la mer,*" republished the *Guidon* in a more modern dress. Twenty-five years later, the celebrated *Ordonnance* of Louis XIV. gave the force of law to provisions, the greater part of which were drawn from this treatise.

Third period. Positive legislation. The Ordonnance.

Colbert, the enlightened minister of Louis XIV., had conceived the design of constructing a Code of maritime law for the kingdom of France, which should take the place of the various and often conflicting customary laws of the several provinces; and this design, though perhaps as difficult as one which we in England content ourselves with wishing for, the French statesman accomplished. How this was done, may be gathered from the pages of Valin (*l*). The existing written materials, in the shape of old laws and ordinances, not of France only, but of other countries, appear to have been collected, their subjects arranged under heads, and a comparative criticism made. A commission of inquiry, with ample powers, went round the several seaports, for the purpose of ascertaining what customary laws or rules were observed in each, their origin, and practical working. The materials thus

(*l*) Valin, Comm. sur L'Ordonnance, pref. viii.—x., edit. 1829.

obtained were then placed in the hands of one man, a lawyer, to work into shape (*m*); after which the Code was settled, article by article, in the King's Council (*n*). Amongst the written works thus used as materials for the first stage in this process was the "*Guidon de la Mer;*" a comparison of which with those articles of the Ordonnance which treat of insurance, shows that the Ordonnance is little more than an authoritative and condensed reproduction of the *Guidon*.

The influence of the Ordonnance was felt throughout Europe. It took the best part of a century, however, before that influence reached England, or at any rate, the English Courts of law.

Early history of insurance in England.

In England, according to Malyne, who wrote in 1622, Lombard merchants had at an early period established their trading companies or agencies, and with these their practice of marine insurance; and this latter, according to the same author, we in our turn had the honour of introducing into Antwerp and the Low Countries, in proof of which he alleges that to that day it was the practice to insert in the policies drawn up at Antwerp a clause to the effect that the contract should be as valid and binding as if it had been subscribed in Lombard Street, in the city of London (*o*).

England came late into the field of commercial enterprize. "Some attempts were made by Parliament," says Marshall, "in the reigns of Edward III. and Richard II., to encourage English shipping, but without effect; for we find that in the eighteenth year of Henry VI. the Commons petitioned that no Italian or other merchants of the countries beyond the streights of Gibraltar should sell here any other merchandize than that of the countries beyond those streights. And the reason assigned for the

(*m*) This lawyer, says Valin, was rewarded for his trouble with the post of Master of Requests, from which, however, he had presently to be removed, his abilities proving unequal to it!

(*n*) 4 Pard. 239—246.

(*o*) 1 Marsh. Ins. 11.

regulation thus prayed was, that the Italians had become the carriers, not only of the commodities brought from the countries within the streights, but also of the countries without the streights, which were not brought in such abundance, nor sold so cheap as when they were brought by the merchants of the countries which produced them. The petitioners prayed, therefore, that this might pass into a law for ten years; but the King did not consent to it. At length, however, by stat. 1 Rich. 3, c. 9, great restraints were laid, both upon these Italian merchants and their commerce" (*p*).

In the reign of Queen Eiizabeth, a statute was passed in which, after a recital of the great usefulness of marine insurance, and that insurances had been practised time out of mind within our realm, and that controversies concerning them had heretofore been settled by certain grave and discreet merchants, appointed thereto by the Lord Mayor of London,—a vestige probably of the mercantile tribunals of the "Prior and Consuls" common at that time throughout Europe,—proceeded to constitute a more formal Court for the purpose, having power to enforce its decrees by imprisonment, but to act in a more speedy and simple method than that of the ordinary courts of law (*q*). This new court, however, never attracted much business. Merchants and underwriters appear to have gone on the old way, preferring arbitrators of their own selection, presumably as being more knowing in the ancient usages of insurance. The result was that, during the long period between the statute of Elizabeth and the time when Lord Mansfield took his seat as Chief Justice of the King's Bench in 1756, there were surprisingly few judgments concerning insurance in the Courts, and these very unimportant. Up to the time of Lord Mansfield, we have it on the authority of Mr. Justice Park that what few insurance cases were reported in the books were

(*p*) 1 Marsh. Ins. 12.

(*q*) 1 Marsh. 27.

"such loose notes, mostly of trials at Nisi Prius, containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject" (r).

We are not, however, without the materials for a tolerably accurate knowledge of the state of our English practice at the period which immediately preceded that which may be called the starting-point of the English case-law of insurance. These are to be found in the writings of Beawes, whose "*Lex Mercatoria Rediviva*" appeared in 1754, and of Magens, whose "Essay on Insurance and Collection of Sea-Codes" was published in the following year. These volumes show that, in the absence of native judicial authority, the practices of merchants and insurers were largely influenced, if not governed altogether, by the Codes, Ordinances, and commentators of the Continent. Amonst these, the "*Guidon de la Mer*' is usually cited as chief, and next to it the Ordonnance of Louis XIV.; though the Ordinances of Antwerp, Amsterdam and Rotterdam, Bilbao, Middleburg, and others, are likewise constantly referred to. Oral practices were becoming absorbed in, or confused by, the written rules of foreigners, while there was as yet nothing of home growth to take their place. **Early English practice.**

The great intellect and lucid eloquence of Lord Mansfield here came in to supply a real want. During the thirty-two years (1756 to 1788) that this great judge sat on the bench, he did more towards constructing a law of insurance than has, or indeed could by possibility have, been done during any equally long period since. His long supremacy gave a sort of unity to the system which it has retained ever since; and thus his work may almost be compared to that of legislation. We have in his judgments the foundations of perhaps every department in our system. **Early English law.**

(r) Park, Ins. Intr. xlviii.

Mode of growth of the English case-law.

Such, then, was the aspect in which marine insurance presented itself to the English Courts of law, at the time when they began seriously to direct their attention to it. It came before them as a very ancient and matured system, resting partly on the basis of foreign codes and ordinances and partly on the practice of mercantile men. The ordinances differed from one another more or less in details, but were all cast in one mould, indicating a common origin. The practice, so far as it went beyond these ordinances, was not always intelligible, as to its grounds, even to the professors of it; but was not the less on that account the object of an almost superstitious veneration, being supposed, from its long acceptance, to be peculiarly adapted to the requirements of seafaring men, merchants, and underwriters.

First stage: submission to practice.

What the Courts had to do was, first to ascertain what this system was, and then to assimilate it to the general principles of English law; and this last was to be done in such a manner as not to deprive it of those special qualities which had rendered it thus acceptable to mercantile men. This has been done very gradually, and the earlier steps in the process were naturally unlike those taken later. For the first of these purposes,—the ascertaining and defining with precision what that system was, —there was requisite an almost absolute deference to foreign laws and to mercantile practices. Hence, the principles of insurance were at first gathered almost exclusively in the way of induction, from noting the treatment of particular cases which was adopted in the practice of merchants. During this period, these practices were regarded as things sacred; special juries of merchants, supposed to be cognizant of them, were appealed to by the judges for their guidance on what would now be regarded as matters of pure law (*s*); the Courts refused even to listen to merely theoretical arguments, when the

(*s*) *Lewis* v. *Rucker*, 2 Burr. 1167.

point at issue could be determined by custom (*t*); and it seemed as if the function of the judges was reduced to the humble one of registering the customs of merchants, and the rules which had been laid down in foreign codes or by foreign commentators, like Valin and Emerigon.

Second stage: criticism of practice.

By degrees, however, as more and more of this system of ancient customary or foreign law was brought before the Courts, till the outline of it was disclosed and it began to be understood as a whole, a change of treatment on their part, insensibly set in. Custom now had little fresh important matter to reveal. One point of practice was naturally compared with another: where several of such corresponded, the principle of the correspondence was sought out; where they contradicted one another, it began to be questioned which of them was in the right: in either case, the transition was made from a search after practices to an inquiry into principles. The steps in this transition took the form of rules successively laid down by the Courts for limiting the domain of custom or usage. The first of these rules was, that usage must in no case be permitted to override the language of the policy, even in its printed part—a matter as to which there had previously been some laxity (*u*). At a later period it was laid down that a usage, to be binding, must be reasonable (*x*). This naturally led to the distinguishing of usages under two heads: those which admitted, and those which from their nature did not admit, of being

(*t*) *Palmer* v. *Blackburn*, 1 Bing. 61; *Winter* v. *Haldimand*, 2 B. & Ad. 649; and see 1 Duer, 283.

(*u*) *Blackett* v. *Royal Exch. Ass. Co.*, 2 C. & J. 244.

(*x*) See 1 Duer, Ins. 268. It is not here intended that this doctrine was at that time in itself a novelty: probably it was from the oldest times, implicitly at least, a principle of the English common law: the novelty lay in the application. Until the system of insurance as practised had come to be somewhat understood by the Courts as a whole, they were not in a position to criticize the reasonableness of its usages.

determined by some general principle. To the latter head belong such matters as the rule that the deduction to be made for the improvement of a ship by putting in new work in place of old shall be assessed at one third of the cost; there being in this no other principle than the convenience of having some one uniform scale for the deduction. How much that deduction should be, is a matter of almost arbitrary detail; and as to this the ancient and general practice of merchants was adopted by the Courts without questioning (*y*). But where there is a practice which pretends to legislate on matters which admit of deduction from principles, it is now clear that the Courts will attach no weight to it. They will be judges of its reasonableness, and this they will judge upon principles; and since they would have judged the question upon the same principles had there been no practice at all, the result is, that the practice is almost entirely disregarded (*z*). There has been insensibly, on the part of our Courts, a complete change of attitude towards mercantile usages.

Thus has grown up by degrees an English law of marine insurance, not based on *à priori* principles, but gradually transforming or enlarging the matter given to it in the form of usage or rules imported from abroad, under the influence of principles belonging to the general mercantile law of England. This growth is still going on; for, although so much has been settled that the main outline of the system is now unalterably determined, and perhaps some of its branches may be said to be complete and final, many points still remain *sub judice*. We may not only hope, but expect with some confidence, that these undetermined questions will be dealt with, by the wisdom of our judges, on principles not less broad and

(*y*) *Lohre* v. *Aitchison*, 2 Q. B. D. 501, at 508.

(*z*) *Stewart* v. *West India S. S. Co.*, 42 L. J. (Q. B.), 84; *Atwood* v. *Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286.

enlightened than are to be found in the later, as distinguished from some of the older, judgments; so that, when this branch of law comes to be codified, as sooner or later it is sure to be, the result may stand as superior to the great Ordonnance of Louis XIV. as the age of Victoria is better than the age of the *Grand Monarque*.

MARINE INSURANCE.

CHAPTER I.

INSURABLE INTEREST.

PRELIMINARY.

§ 1.—INSURANCE, in its origin, was simply a contract of indemnity; it was to protect the owner or person pecuniarily interested in a ship or cargo exposed to hazard against the risk of loss. It supposed, therefore, that there was an interest in the thing insured on the part of the assured, and it supposed that the amount payable by the insurers was to be the amount which the assured had lost. Theoretically these suppositions form the basis of the English, and probably of every other, law of insurance. In practice, however, the latter of these two suppositions has been considerably modified, and this for reasons which it may be well here to explain.

§ 2.—The first of these presuppositions, that there must as the basis of every insurance be a genuine *interest* in the thing insured, may be very briefly dismissed. That he who effects an insurance, or on whose behalf and for whose benefit it has been effected, must be so situated with regard to the thing insured as to expect pecuniary benefit from its safety, or pecuniary loss from its destruction, is an axiom which from the earliest times has been

recognized by the English courts of law. Insurance is not intended as a means of wagering; but our Courts have always been favourable to freedom of contract, and in former times did not refuse to recognize a practice which had grown up, of inserting clauses in policies for dispensing with interest, or with the proof of it (*a*). In the reign of George II., however, suspicions arose — significantly enough, it was shortly after the bursting of the "South Sea Bubble"—that a system of gambling, under the guise of insurance, with the aid of these clauses, had led to various mischiefs, such as the fraudulent wrecking of ships, and contraband or illegal traffic; and an Act of Parliament (*b*) was passed to put a stop to it. By this Act, every insurance made with any of the clauses specified, viz., "interest or no interest," or "without further proof of interest than the policy," or "without benefit of salvage," *or made by way of gaming or wagering*, was declared wholly void. Some exceptions were allowed, but these, by the effect of a subsequent statute (*c*), have been swept away; and now, as the result of several decisions in our courts, it may be broadly laid down that every insurance which either in the letter or the spirit is contrary to the Act of George II., that is, which either contains one of these clauses, though there be a real interest at bottom, or which, though containing none of these clauses, has no real interest at bottom, is wholly void (*d*).

§ 3.—As to the amount insurable, however, there are practical reasons which from the earliest times have prevented the strict enforcement of that which in theory is undoubtedly the true rule, namely, that the indemnity should be restricted to the amount actually lost by the assured.

(*a*) *Cousins* v. *Nantes*, 3 Taunt. 513.

(*b*) 19 Geo. 2, c. 37.

(*c*) 8 & 9 Vict. c. 109, § 18, enacting that all contracts or agreements by way of gaming or wagering, shall be null and void.

(*d*) *Smith* v. *Reynolds*, 1 H. & N. 221; *De Mattos* v. *North*, L. R. 3 Exch. 185; *Mortimer* v. *Broadwood*, 20 L. T. 398; *Allkins* v. *Jupe*, 2 C. P. D. 375.

Insurance, as was pointed out in the Introduction to this volume, is a contrivance intended to assist the merchant and shipowner in carrying on his business, by enabling him to leave out of sight, in making his calculations of expected profit, all the uncertainties arising from the dangers of navigation. This being so, the contrivance will do its work perfectly only if the assured can treat those dangers as absolutely immaterial to him; which can only be if he is entitled to receive the same amount, in case his property be lost by reason of them, as he would have received had it not been lost. Nor is this all: he must not only receive the same amount, but he must receive it as certainly and as promptly; or at least he must be sure of receiving it so promptly as to be able to carry on his business without interruption.

In the times when insurance was invented, and when the basis of its rules was laid down, it is probable that the latter of these considerations had even more weight than at the present day; merchants generally being poorer, and working on a smaller scale, and the facilities of credit and banking being comparatively unknown. We find, in fact, that the rules laid down in those times in many respects sacrificed theoretical exactness of amount for the sake of ease in computation and despatch in settlement. The assured was content to take a sum which very roughly approximated to his actual loss, so that he might be sure of having it paid promptly. He was content to take the amount which his goods had *cost* him, instead of that for which he expected to sell them at their intended market; no doubt because the former sum could be shown at once, the moment a loss had occurred, and because it could not be disputed; whereas the latter, though the true measure of his loss, was questionable, and might give rise to delay in the proving of it. The system which we find laid down in the Guidon, that is to say the oldest system on record, was this: the merchant carried with him in the ship, or sent with the goods if he did not go himself, the *docu-*

ments of the goods shipped, which were the bill of lading, the invoice or cargo-book—showing what the goods had cost—and the policy of insurance; and it is laid down as a rule, that all these documents must be conformable to one another,—in other words, that the shipment of the goods named in the policy must be proved by the bill of lading, and that the amount insured must correspond with the amount shown by the invoice (*e*). When a loss took place, all that the merchant had to do was to prove the fact of loss, and then on exhibition of these documents the insurer was bound to pay at once. If the insurer should have, or think he had, any defence or objection, this was not to prevent an immediate payment; he was to pay first, and go to law afterwards (*prima pagare, dipoi litigare* (*f*)), the merchant of course giving security to refund the amount in case the insurer should succeed in proving himself not liable.

There was, however, in those times one significant limitation to the right to insure. The merchant was always required to take one tenth part of the risk himself. This was done, according to the Guidon, "to prevent abuses, and the great negligence which is found in merchants when they are insured for the whole" (*g*). This rule, perhaps a very salutary one, was, in the Ordonnance of Louis XIV., so far modified that the owner of merchandize was allowed, though only by express stipulation in the policy, to insure the whole, except in the case where

(*e*) Guidon, Chap. ii., §§ 8, 9. The Guidon goes into great detail as to how the invoice shall be drawn up so as to correspond with the amount recoverable under the policy, and here first we have the basis of that system called *covering—i.e.*, adding the cost of insuring the goods, and also of insuring the premium, which is further explained below (§ 30). All this was to appear on the face of the invoice or cargo-book.

(*f*) These words are in one of the oldest extant forms of policy, referred to in a Florentine ordinance of 1523; 4 Pard. 607. The insurer undertook to pay within two months. This system is slightly modified in the Guidon, Chap. 3, § 2; 2 Pard. 385.

(*g*) Guidon, Chap. 2, § 11; 2 Pard. 382.

the ship likewise belonged to him; but the shipowner must in every case bear his own tenth of the risk, and no stipulation to the contrary was held lawful (*h*). By degrees this restriction has disappeared, and I believe there is no record of its existence at any time as known to the law of England.

The practice of inserting in policies agreed valuations which should not be open to dispute is of later origin. It seems to have crept in timidly and by degrees. It began, probably, in insurances of return cargoes obtained by barter, as to which the actual cost might be matter of dispute; and in insurances of ships, the actual value of which is at all times difficult of proof. At the time of the Guidon, a valuation in the policy was not treated as indisputable: it might be questioned by the insurers, and if proved to be *excessive*, which is defined to be, if it exceeded the actual value by the quarter, the third, or the half, it was to be reduced to what the thing insured was actually worth (*i*). This rule likewise is substantially repeated in the Ordonnance of Louis XIV. (*j*). In England, however, as we shall see, our Courts have treated these valuations as sacred.

Another fact should here be noted, which has had a considerable influence on the development of the law of insurance, as affecting the amount to be insured. The great French jurists, Valin and Emerigon, whose Commentaries on the Ordonnance of Louis XIV. were studied with much deference throughout Europe, elevated the practical rule which they found to their hands, of taking the *cost* of the goods as the basis of insurable value, to the dignity of a principle. They connected it with the maxim of the Roman law, *Nemo debet locupletari alienâ jacturâ.* If

(*h*) Ordonnance, Tit. vi., Arts. 18, 19; 4 Pard. 372.

(*i*) Guidon, Chap. 2, § 13; 2 Pard. 383.

(*j*) Ordonnance, Liv. 3, Tit. vi., Arts. 8, 23; 4 Pard, 371, 373; and see Valin, Liv. 3, Tit. vi., § 8, p. 469 of edit. 1829; and Emerigon, Ch. 9, Intr., p. 265 of Boulay-Paty's edit.

no one is to grow rich through another man's loss, they argued, no one ought to insure any sort of profit. Even a shipowner's freight is a sort of profit, and must not be insured. Insurance is to be strictly limited to what the thing insured has cost. This principle they elaborated with the greatest nicety, discussing many curious questions raised by it with the exactness to be expected from men of such powers of mind, imbued with the conviction that to recover from an insurer more than the thing had really cost was a species of moral delinquency. Strangely enough, this supposed principle is at the present day the basis of the law of France. It has left some traces even in our own law; though with us it exists only in the shape of inconsistencies, and what to a man of business appear mere absurdities. Thus, by our law, profit may be insured, freight may be insured, anything whatever may by an agreed valuation be insured for no matter how much more than its actual value—always supposing no fraud be intended; but still, if there be no valuation, the amount recoverable under a policy on goods is only what the goods have cost. So it was laid down by Lord Mansfield, borrowing in all probability from Valin; and so, one judge building on what another has laid down, it has remained ever since. It needs no argument to show that this is not the true principle of an indemnity; on the contrary, since what is insured is always an *expectation*, the amount to be insured ought in theory to be *the amount expected;* that is to say, in the ordinary case of goods exported for sale, the amount they are, at the time of insuring, expected to sell for, minus the freight and charges that must first be incurred by the exporter (*k*). Our law, in not recognizing this fact, which is obvious to all men of business, falls, as we shall see, into all sorts of inconsistencies. It

(*k*) A subsequent change of circumstances, as, for instance, a rise or fall in the market, between the shipment and a loss, may introduce an uninsured element, or otherwise lead to complications. The effect of this will be considered later.

is much to be wished that by an Act of Parliament, the only way now open, the law of insurable interest should be placed on a simple and rational basis.

§ 4.—This subject of insurable interest includes the questions, who may insure, what may be insured, and for what term or length of time, and how much may be insured. Of these questions, all except the last are so closely connected together that I propose to group them in one, dealing afterwards with the question of amount, which naturally includes the consideration of the effect of valuations. To complete this branch of the subject, I have added a few words explaining the rules for applying insurable interest to the policies, where there are several of them; and as an appendage to this, the rules for return of premium.

I begin, then, with the questions who may insure and what may be insured. As to this, so long as the question of amount is left out of sight, the English law may now be said to be based on one broad principle. Expectation of pecuniary gain, or risk of pecuniary loss, furnishes the touchstone of what is called insurable interest, and gives the right to insure. Every person who stands in such a relation to property hazarded at sea that he will sustain a pecuniary loss if that property is injured or destroyed by the perils incident to navigation, has an insurable interest.

The oldest subject of insurance is merchandize; and with this I begin.

INSURABLE INTEREST IN CARGO.

Insurable interest in merchandize may conveniently be classed under the heads of ownership, the legal title of a trustee, a right of lien, an equitable lien or assignment, or the being answerable for its safety as a bailee. These are

the principal, though perhaps not the only, relations to property which give a right to insure as principal (*l*).

Ownership. § 5.—In the case of ownership, the right to insure, or to recover as a principal in the event of loss, begins, ordinarily (*m*), when ownership begins, and ends when it ends. He who buys a cargo "free on board" does not become owner of it, and is not liable to pay for it, till it has come on board; therefore, as he loses nothing if part be lost in a lighter coming off to the ship, he can make no claim on his policy, though that policy by its terms undertakes to cover the risk of lighterage in loading. Or if by the terms of his purchase he is not liable for the purchase-money until an *entire* cargo has been shipped, he cannot use his policy to recover, either for himself or the vendor, a loss of cargo that takes place during the loading, *i.e.*, *before* an entire cargo has been shipped (*n*). If he claims for himself, the answer is that he has lost nothing; if for the vendor, he has no right to oblige the vendor at the expense of his underwriters. So if he sells the cargo afloat, and does not at the same time agree to transfer the policy to the purchaser, he cannot use it to recover a subsequent loss, either for his own benefit or that of the purchaser (*o*).

(*l*) See *per* Willes, J., in *Seagrave* v. *Union Marine Ins. Co.*, L. R. 1 C. P. 305, at 319.

(*m*) There may, however, be exceptional cases in which the contract for purchase is of such a nature that the vendor may be liable to pay, notwithstanding the goods be lost before they become in a technical sense his property; as where one purchases a portion out of a larger mass of goods, and the goods may be lost before distribution or allocation. In such a case insurable interest begins, so soon as there has arisen a state of things in which the safety of the thing insured has become a matter of pecuniary concern to the assured. (*Stock* v. *Inglis*, 10 Q. B. D. 564.)

(*n*) *Anderson* v. *Morice*, L. R. 10 C. P. 609; 1 App. Ca. 713. So, if the title of the assured to the property in the thing insured does not begin until there has been an appropriation of some specific part of the bulk, there is no insurable interest till then. (*Stock* v. *Inglis*, 9 Q. B. D. 708.)

(*o*) *Powles* v. *Innes*, 11 M. & W. 10; *North of England Oilcake Co.* v. *Archangel Ins. Co.*, L. R. 10 Q. B. 249. It is usual, in selling afloat, to sell the policy likewise; the terms being "cost and insurance," or, sometimes, "cost, freight

If indeed a sale is made in such a manner as to reserve the vendor's right of stoppage *in transitu*, the policy made by the vendor continues in force so far as to protect that right; such a vendor having what is analogous to a lien on the cargo (*p*).

§ 6.—One who has a right of lien on merchandize, or a power to take possession of it on arrival and hold it as security for a debt, has likewise the right to protect that lien by insuring the goods. The most frequent case of this kind is that of a consignee who has made advances on the security of the bill of lading. There is no doubt that such a consignee can insure the goods in his own name and for his own benefit, to the extent of the advances. If he goes beyond this and insures to the full value, he recovers the surplus, in the event of loss, as trustee for the owner of the goods (*q*). Lien.

§ 7.—A consignee to whom the owner of the goods owes money, though not in respect of advances on the security of the goods themselves, and to whom the goods are consigned for the purpose of discharging or reducing the debt, may apparently be considered as having a sort of equitable lien on the goods, sufficient to entitle him to insure them (*r*). Assignment.

and insurance." Under such a contract, any policy actually effected by the vendor must be handed over to the purchaser, and the latter is entitled to require a policy sufficient to cover the *original* cost of the goods, *i.e.*, their cost at the port of loading, including the premium, but not necessarily an amount equal to the sale afloat. (*Ralli* v. *Universal Mar. Ins. Co.*, 31 L. J. (Ch.) 207, 313; *Tamvaco* v. *Lucas*, 1 B. & S. 185; 3 B. & S. 89.)

(*p*) Comp. *Browne* v. *Hare*, 3 H. & N. 484; 4 H. & N. 822; and *Wait* v. *Baker*, 2 Exch. 1; and see *Seagrave* v. *Union Mar. Ins. Co.*, L. R. 1 C. P. 305; at 317–319.

(*q*) *Ebsworth* v. *Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596. The Court in this case were equally divided on the question whether in such a case the surplus could be recovered by the assured in an action brought in his own name. And see *Glyn* v. *E. and W. India Docks Co.*, 6 Q. B. D. 475, at pp. 481, 490.

(*r*) *Hill* v. *Secretan*, 1 B. & P. 315; and see *Seagrave* v. *Union Mar. Ins. Co.* L. R. 1 C. P., at 319. The rule is given by Willes, J., as follows: "The general rule is clear, that, to constitute interest insurable against a peril, it must be an interest such that the peril

Bailee.

§ 8.—Lastly, one who is answerable for the safety of the goods, as a common carrier or wharfinger, may protect himself against this liability by insuring the goods (*s*).

§ 9.—In all these cases, where the right to insure the same goods subsists in more than one person, *e.g.*, in the owner and in one who has a lien, it is not to be supposed that under the two policies together more than a single indemnity can be recovered, since the losses in the aggregate cannot exceed the entire value of the commodity (*t*).

INSURABLE INTEREST IN SHIP.

§ 10.—Each part-owner of the ship has the right to insure his share as principal: if the managing owner insures the whole, he insures the shares of his co-owners merely as agent (*u*).

Sale at sea.

§ 11.—If a ship is sold at sea, the policy of the vendor ceases to cover it, unless it be transferred to the purchaser for a price or as part of the transaction of sale (*x*). If however the sale is on such conditions as to leave the risk of the then current voyage, or any part of it, with the vendor, the policy continues to protect him to that extent (*y*).

Mortgagee.

§ 12.—If a ship is mortgaged, the mortgagee is entitled

would by its proximate effect cause damage to the assured." (*Seagrave* v. *Union Mar. Ins. Co.*, L. R. 1 C. P. 305, at 320.)

(*s*) *Crowley* v. *Cohen*, 3 B. & Ad. 478; *Waters* v. *Monarch Life Ass. Co.*, 5 E. & B. 870.

(*t*) See Arn. Ins. 117–119.

(*u*) *French* v. *Backhouse*, 5 Burr. 2727; *Robinson* v. *Gleadow*, 2 Scott, 250.

(*x*) *Powles* v. *Innes*, 11 M. & W. 10. The stat. 31 & 32 Vict. c. 86, enables assignees of marine policies to sue in their own names; "the defendant in any action entitled to make any defence which he would have been entitled to make if action brought in the name of the person by whom or on whose account the policies sued on were effected." See *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299; *Pellas* v. *Neptune Ins. Co.*, 7 C. P. D. 139; 5 C. P. D. 34.

(*y*) *Reed* v. *Cole*, 3 Burr. 1512.

to insure it as principal to the extent of the mortgage debt. If he claims more than that, he must prove that the policy as to the surplus was originally effected for the benefit of the mortgagor. In such cases, therefore, it is better for both parties to come to a clear understanding as to insurance beforehand (*z*).

§ 13.—If a ship is chartered, with the condition that she is to be at the charterer's risk, or that the charterer shall replace her value if she is lost, the charterer has a right to protect himself by an insurance of the ship; and he may insure in his own name, and recover as principal. This does not do away with the right of the shipowner to insure her likewise, for he is not bound to trust to the security of the charterer (*a*). **Charterer.**

§ 14.—As with cargo, if two persons have insured the ship, and each to the full value, the total recovery in case of loss can only be for one value of the ship, since no more is really lost on the whole.

§ 15.—Sometimes the outfit is insured separately from the ship. Outfit is, correctly speaking, that portion of the ship's furniture or apparel which ordinarily perishes or is consumed in the course of the voyage, as, provisions for the crew, spare ropes, and the like: but sometimes mere payments, such as advances to the crew, or things of no intrinsic value, as ballast, are called outfit, though less properly so. This expenditure is incurred merely to earn the freight, and bears somewhat the same relation to the freight as the prime cost of the cargo bears to its proceeds when sold at the end of the voyage. Consequently, whenever the freight can be insured, it is unnecessary and improper to insure the outfit likewise. But when a shipowner cannot insure freight, as in the case of an unchartered ship going out in ballast to seek a cargo, he may reasonably wish to insure his risk of losing his compensa- **Outfit.**

(*z*) *Irving* v. *Richardson*, 2 B. & Ad. 193.

(*a*) *Hobbs* v. *Hannam*, 3 Camp. 93.

tion for this expenditure, which may not improperly be regarded as an enhanced value of his ship for that voyage only. In practice, as this purpose may be equally well and for some reasons more conveniently attained by an additional insurance on the ship itself for the voyage only, at an increased valuation, insurances on outfits are now very seldom used.

Passenger outfit. § 16.—With regard to passenger ships, the policy on the ship is understood to cover all such passenger-fittings as are permanent, or go on voyage after voyage; but not the passenger provisions or stores laid in for the particular voyage only. There is however no great use in insuring these, since it is all one to the owner whether they are sunk or eaten (*b*).

Whalers' tackle. § 17.—In whaling voyages, an insurance on the ship does not cover the harpoons, lines, and other tackle for the fishery (*c*).

INSURABLE INTEREST IN FREIGHT.

§ 18.—Is it right to permit the insuring both of a ship and her freight?

In the oldest sea laws known to us dealing with insurance, the insuring of freight was prohibited: in France it is so still. But the reason assigned for this prohibition is not the same reason as that to which the reader's attention is now to be invited.

A great part of the confusion which runs through some branches of the English law of insurance is occasioned by the want of a clear apprehension of the true relation between the ship, considered as a subject of insurance or a commodity of value, and her freight. This can only be

(*b*) The insuring of passenger-liabilities is another matter. Surplus passenger stores, were it worth while, might be insured.

(*c*) *Hoskins* v. *Pickersgill*, 1 Park Ins. 126.

removed, I think, by rightly understanding what it is that constitutes the value of a ship.

A ship is a mere machine for earning freights, and her value theoretically is represented by the present or capitalized value of her future earnings, added to what she may eventually fetch for breaking up. This is obvious at a glance in the case of a ship so nearly worn out as to be only fit for one voyage more; such a ship being evidently worth to her owner what she will earn on that voyage and what he can then break her up for. The principle is of course the same in cases where the calculation may be more difficult. The ship's value in the market is no more than a rough approximation to this result, made by a number of persons: for, the price a man will offer for a ship in the market must at last be regulated by, or find its maximum in, the amount he expects to earn by employing her.

This being so, it is evident that the freight which at any given moment a ship is engaged in earning is a constituent part of that ship's value at that moment, just as much as any of her future freights. It makes no difference whether a freight is contracted for or not. Suppose a ship to be placed on the market for sale, and competed for by two bidders, of whom one is ready with a charter arranged for a six months' voyage, which will bring him in a profit of 1,500*l.*; the other has no contract ready, but knows that he can earn a clear 1,500*l.* by the employment of the ship for six months. Further, let us suppose both to be convinced that at the end of this six months the ship will be worth 8,500*l.* On these facts each should be ready to bid against the other for the ship up to 10,000*l.*

This might lead us to the conclusion that it is not right to insure both ship and freight, for if the freight is only a part of the ship's value, to insure both would be to insure the whole and a part too (*d*).

(*d*) See, however, *per* Bramwell, B., in *Hickie* v. *Rodocanachi*, 4 H. & N. 455.

There are however great practical conveniences in insuring freight by itself; particularly because the earning or losing of a freight once contracted for may depend on contingencies separate from the safety of the ship: for instance, the ship may be lost and yet the freight be earned by transhipment, or the ship may be saved and the freight be lost because the cargo is lost.

But then, if the freight is insured by itself, the fact ought to be recognized that what remains of the ship's value, after excluding this freight, is a portion only of its entire value. We shall see as we go on what confusion, it might even be said what injustice amounting to absurdity, has resulted from not recognizing this somewhat obvious truth.

§ 19.—The rule of English law, as to the right to insure freight, is, that a freight actually contracted for under a bargain that can be enforced at law may be insured; but a future freight which is as yet a bare expectation, not thus secured, cannot be (*e*). If a ship has been chartered, the charterer must supply a cargo or be liable to an action; one way or the other, the earning of freight, if not prevented by the perils insured against, is a certainty (*f*).

(*e*) The case commonly known as "the orchella-weed case" well illustrates the strictness with which this distinction is enforced. A ship was at anchor off one of the Cape de Verde islands, loading orchella-weed: some had been put on board, and men were at work on the island, picking and preparing enough weed to fill the ship, the Governor of the island having promised her a full cargo, when a storm came on, and the ship was wrecked. Here the underwriters on freight were held liable to pay the loss of freight on that portion only which had been actually laden. "For aught that appears," said Lord Ellenborough, "the Governor might have refused to send on board another bag, without subjecting himself to an action, and, although the storm had never arisen, the ship might have been obliged to return to Liverpool nearly empty." (*Patrick* v. *Eames*, 3 Camp. 441.)

(*f*) It must now apparently be taken that this certainty arises, not merely when the ship has actually entered into the service of the charterer, but so soon as the charter has been executed: see *Barber* v. *Fleming*, L. R. 5 Q. B. 59; *Foley* v. *United Fire and Mar. Ins. Co.*, L. R. 5 C. P. 155; and *Potter* v. *Rankin*, L. R. 3 C. P. 562; 5 C. P. 341.

But a ship that sails in ballast seeking a cargo, however confidently or reasonably a freight may be expected, may fail to find employment; so that to insure the expected freight at that stage would be little better than a wager. If a ship not chartered is loading on the berth, the requisite legal certainty is acquired as each parcel of goods is put on board, or is contracted for.

PROFIT AND SIMILAR INTERESTS.

§ 20.—The insuring of profit in any form was of old strictly forbidden, sometimes under heavy penalties (*g*); and the reason why the insuring of freight was prohibited was, that it was a kind of profit. This arose from the mistaken idea of the purpose of insurance already pointed out (§ 3). It was argued that no one ought to make a gain from another man's loss, and that a merchant must therefore be content with an indemnity for actual loss suffered, that is, the replacing of what the thing insured cost him (*h*). **Profit generally.**

The law of England long ago discarded this narrow conception of insurance. It recognizes the fallacy in it; that it is not true that the merchant makes a gain by the insurer's loss, if he is merely placed thereby in the same position as if the loss had not occurred, which he can only be, by receiving the same profit on the sale of his

(*g*) By the Ordonnance of Louis XIV., the penalty for valuing goods beyond their cost or value in the loading port was, that the policy became wholly void, and *the goods themselves were forfeited.* (Ord. Tit. 26, Art. 22; 4 Pard. 373.)

(*h*) By the same Ordonnance, the shipowner is forbidden to insure his freight, the merchant his profit, or the master his wages. Emerigon, commenting on this, says, that in buying and selling it no doubt is lawful to make by fair means a profit at the expense of another, but not so in insurance, this being a contract only to prevent loss, and as to which the maxim of the Roman law, *Nemo debet locupletari alienâ jacturâ*, is applicable. (Emerigon, *Traité d'Assurance*, ch. 9, § 1.)

merchandize as he would have received had it arrived safe (*i*).

Profit, then, may be insured; and this either separately as an interest by itself, or with the goods as a part of their value (*k*). The latter is the better course, when goods and profit belong to the same person; only, as will be seen, it is then necessary to make a valuation, or to state on the policy that such or such a rate of profit is included. If the profit is on a purchase to arrive, so that the expected profit and the ownership of the goods are in different hands, a separate insurance on profit must be made.

When profit is insured by itself, it is necessary, before recovery in case of shipwreck, to prove that at the time of wreck the interest in profit still continued; or, in other words, that, as things stood then, had there been no wreck, there would have been some profit (*l*). This seems to be requisite, even in the case of a valued policy, if on profit alone. This rule makes the right to insure profit separately one of little use, except in cases where either the market is steady or the profit has been secured by a re-sale or otherwise.

Profit or freight on ship-owner's goods.

§ 21.—If the owner of a ship lades her with goods of his own, the gain he expects from carrying them to a market is really composed of two elements, his freight as ship-owner and his profit or loss as merchant, and these elements it is sometimes hardly possible to separate from one another. This expectation, then, may be insured

(*i*) *Barclay* v. *Cousins*, 2 East, 544.

(*k*) In a recent case it came out in evidence that underwriters at Lloyd's treat it as a matter of course, not necessary to be communicated to them, if a profit not exceeding 25 or in some cases even 30 per cent. is added to the cost of goods in making a valuation. (*Ionides* v. *Pender*, L. R. 9 Q. B. 531, at 535.)

(*l*) *Hodgson* v. *Glover*, 6 East, 316. In the United States, the rule is that when an interest in the goods themselves has been proved, interest in a fair mercantile profit on them follows as a matter of course. (*Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222, Phillips Ins., § 318.)

either under the name of freight or as an increased value of the goods.

This last interest is constituted, or begins to exist, so soon as a cargo has been purchased or set apart for the specific purpose of being carried in the ship, and the ship is likewise ready to load or fetch the cargo; from which point of time the earning of this freight or profit is,—subject only to a change of intention on the part of the shipowner, which presumably he would not make but in prospect of a more profitable freight,—a matter of legal certainty (*m*).

§ 22.—One who by prepayment of the freight, or of a part of it, has secured for himself the right to have his goods carried in a ship free of further charge, or free of it to the extent of the prepayment, is to that extent in a position precisely analogous to that of a shipowner who has goods of his own to carry (*n*). He has therefore an insurable interest, which he may describe either as "advance-freight," or as an additional value of the goods to be thus carried. **Prepaid freight.**

(*m*) *Flint* v. *Flemyng*, 1 B. & Ad. 45. See cases cited Arn. Ins. 66, n. 1. *Devaux* v. *Janson*, 5 Bing. N. C. 519.

(*n*) The law concerning the prepayment of freight belongs more properly to the law of affreightment than to that of insurance. It may be very briefly summed up as follows:—Since, in general, freight is not due till the cargo is delivered, a prepayment or advance of money from the shipper or charterer to the master at any earlier period must be regarded as a mere loan,—to be repaid if by any accident the freight is not earned,—unless an intention to the contrary be in some way expressed or indicated on the charter or bill of lading. But, as shipowners find the receiving of such advances very convenient, but the refunding after a loss less so, it is usual, in the great majority of cases, to have such intention not to refund indicated in the contract of affreightment. Any words to the effect that the advance is "in part-payment of freight," or that it is insurable by the charterer—which implies a risk of the voyage on his part—will suffice for this purpose.

To constitute an absolute prepayment, it is not always necessary that the charter should contain an authority to the captain to draw part of his freight in advance. Such an authority may be implied from the custom of trade, or the mere exigencies of the master's position in a foreign port. (*The Karnak*, L. R. 2 P. C. 505, at p. 514.)

The point at which this insurable interest begins to exist has not as yet been defined by any legal decision. Some think it begins as a matter of course so soon as the prepayment has been made. On principle, however, a further condition seems to be requisite, viz., a legal certainty of deriving benefit from the prepayment. A charterer who prepays freight, intending to occupy the space in the ship thus purchased with goods of his own, which he has in readiness for shipment, has undoubtedly an insurable interest from the time of prepayment or even of contracting to prepay; and it would seem to be immaterial whether the ship is already at the place where the goods are lying, or is to go in ballast to fetch them. It ought, on principle, to be otherwise in the case of a mere speculative charter; as, when a man charters a ship, prepaying the charter-money or a part of it, and then places the ship on the berth, expecting to find shippers. Such a charterer is in precisely the same position as a shipowner who in like manner places his ship on the berth on his own account. In the case supposed, the charterer, instead of buying a ship, has bought the use of one for the voyage; but the probability of his obtaining a freight for her is, until contracts with shippers are actually made, no more a legal certainty in the one case than the other. It is hardly necessary to say that the right to insure is given, not by the prepayment, but by the expectation of a commensurate advantage which is based on it.

Commissions.

An interest somewhat analogous to profit is that of commissions. A commission to be derived from the sale of goods consigned to him, may be insured by a consignee: and his title to insure attaches so soon as the consignment to him becomes a legal certainty, as by receipt of a bill of lading, or any such promise or contract with the shipper or owner of the goods as would support an action for damages in case the consignment was withheld (*o*).

(*o*) Commissions or profits which are merely the "expectation of an

INSURABLE INTEREST IN ADVANCES.

Another possible subject-matter of insurance is an advance or loan; which may be insured, provided the repayment of it is conditional on the safe arrival of property exposed to sea peril, or provided such property constitutes the security for the loan, so that a loss of it, though it may not extinguish the debt, would deprive the lender of his security. On these conditions, but not otherwise, an advance of money constitutes an insurable interest.

Loans on bottomry.

§ 23.—The first and most perfect example is a loan on bottomry or respondentia. Of such loans there are two totally distinct kinds, which may be distinguished as voluntary and necessary. Voluntary bottomry is perhaps the more ancient of the two, and is indeed of far greater antiquity than insurance itself, but is now, so far at least as British shipping is concerned, practically obsolete, having been superseded by less onerous methods of raising money. This kind consists in borrowing money for the outfit or equipment of a ship, or sometimes even to assist in building one, on the condition that the money lent, together with a premium or percentage of profit, shall be repaid on the ship's safe arrival at a port named, but be forfeited by the lender in case the ship be lost on the way. The convenience of such a system, in a rude state of commerce, when insurance was unknown, is obvious enough. At the present day, in this country at least, such loans are superseded by mortgages, advances by banks, or other methods; and our law, which discourages the giving of

expectation,"—*e.g.*, which are expected to be derived from the sale of goods expected to be, but which are not yet, bought or shipped,—do not constitute an insurable interest. (*Knox* v. *Wood*, 1 Camp. 73.)

Though seamen may not insure their wages, the captain may insure his commissions, as well as his effects, or any goods he may have on board as his private venture. (See cases cited in Arn. Ins. p. 45, n. *z.*)

secret or unregistered liens on ships, forbids the owner of a British ship to take money on bottomry in a British port, or elsewhere except under the pressure of unforeseen necessity (*p*). But it must be borne in mind that there are many countries in which this prohibition does not exist: and, as regards the ships of those countries, there is no reason why voluntary bottomry loans should not be insured by English underwriters. Such insurances, however, are rare, in comparison with bottomry loans justified by necessity.

A bottomry loan of this latter kind is ordinarily taken up by the master of the ship, at a port of refuge, when money is wanted to repair the ship or to defray expenses necessary for the completion of the voyage, and when either there is no time, without undue delay, to consult the owners of the ship or cargo, or these, when applied to, refuse to provide the requisite funds. The power of making such a loan, and of pledging the property entrusted to his care as security for its repayment, is conferred upon the master of a ship by the laws of all maritime states in the case of "instant, unprovided necessity," and in that case only. Against the abuse of this power there are various precautions, equally universal amongst all nations; as, that the master can only raise money on bottomry when he finds it impracticable to do so on the personal credit of his owner; that he can only raise it for expenses absolutely necessary for the completion of the voyage, which necessity the lender must himself see to at his peril, otherwise the bottomry bond is void; and, lastly, that he must not have recourse to bottomry until application for funds has been made, wherever practicable, not only to the shipowner but also to the owners of the cargo (*q*).

The lender of money on these terms is entitled to protect himself against the risks he runs by insurance. It is an old and now well-established rule of maritime law that

(*p*) *Royal Arch*, 1 Swab. 269.
(*q*) *Karnak*, L. R. 2 A. & E. 289; *Bonaparte*, 8 Moore, 459.

such insurances must show on the face of the policy the nature of the risk; that is, the policy must be expressed to be "on bottomry" (*r*).

A respondentia loan differs from bottomry only in being made on the security of merchandize alone,—as in the case where the ship has been condemned and sold, and the cargo is forwarded to its destination in another bottom, subject to a charge for expenses which fall exclusively on the cargo.

§ 24.—A second kind of insurable interest which may be classed under the head of advances, is that of salvage, or disbursements giving a lien on the cargo, whether for general average, or special charges. **Marine salvage.**

A salvor, who has an absolute right to salvage so soon as he has brought the property salved into a place of safety, and who has a lien on what he has saved, is entitled, if he permits the property to be removed thence to some other place while he is still unpaid, to protect himself against the risk he runs by an insurance on it.

§ 25.—If the shipowner or his agent has incurred during the voyage any expense which forms the subject of general average, he has a right to insure at all events the cargo's share, for which he has a lien on the merchandize (*s*). It is true that he has, or is generally believed to have, a right in such a case to recover the general average from the owner of the cargo notwithstanding a subsequent loss, but his security based on the lien would be gone, and this risk he may guard against by an insurance. And the same rule applies to disbursements at an intermediate port applicable specially to the cargo, such as the cost of reconditioning it when damaged (*t*). **General average expenses.**

§ 26.—We may go one step further, and say that an advance which is secured on property in such a way as to give an equitable lien on it, or a preferential right which **Advances giving an equitable lien.**

(*r*) *Glover* v. *Black*, 3 Burr. 1394.

(*s*) *Briggs* v. *Merchant Traders' Association*, 13 Q. B. 167.

(*t*) *Hingston* v. *Wendt*, 1 Q. B D. 367.

could be enforced, under the old system, through the machinery of a court of Equity, may, in some cases at least, give an insurable interest in the amount so advanced. This doctrine is laid down in the following case. The English owner of a ship gave a written authority to his agent in New Orleans to make advances for port charges and other necessaries for the ship at that place, and to draw against the freight for the amount advanced. The agent put the ship on the berth, loaded her with cotton, drew against the freight as directed, and, through a correspondent here, insured the amount drawn for as "advance on account of freight." The legality of this insurance, a loss having taken place, was questioned; but the Court held that the authority given by the owner operated as an equitable pledging of the freight, and carried with it a right to insure (*u*).

§ 27.—One or other of these two conditions, however, —either that the debt will be extinguished, or that the creditor will be deprived of a valid security for it, by a loss from the perils insured against, is always requisite in order to establish an insurable interest in an advance. It is not enough that the debtor's whole fortune may be embarked in an adventure by sea, so that the loss of it may convert him from a desirable borrower to a condition of insolvency; since his poverty does not extinguish the debt, and when he had property his creditor had no legal hold on it (*x*).

INSURABLE INTEREST IN LIABILITIES.

The right of a bailee, *e.g.*, of a common carrier, warehouseman, or wharfinger, to insure the goods in his charge against risks for which he would be liable (§ 8), is an example of a more general rule, viz., that not merely an expectation of gain, but liability to loss, which

(*u*) *Wilson* v. *Martin*, 2 Exch. 684.

(*x*) *Lowry* v. *Bourdieu*, 2 Doug. 468.

may come in the form of a payment to a third party, gives a title to insure.

§ 28.—Thus the liability of a shipowner to be answerable in damages to third parties, whether to the owner of another ship with which his own comes into collision, or the owners or consignees of the cargo in his own ship, for damages incurred through the misconduct or negligence of his own servants, is a risk that may be insured against. This is partially done by means of a clause inserted in policies on ships, called the "Collision Clause;" which, though in form apparently a mere appendage to the policy on the ship, is in reality a totally distinct contract or insurance by itself (*y*).

Liability of shipowner for fault of master or crew.

§ 29.—Again, the liabilities of a shipowner under the Passenger Acts may be insured. Passage-money is usually paid in advance, so that a clear total loss of the ship, when the passengers are lost too, causes no loss of passage-money to the owner. But in case of partial disablement, or when the ship is wrecked and the passengers are saved, these Acts impose certain liabilities on the owner of the ship with relation to the passengers, such as the duty of feeding and forwarding them; which liabilities a shipowner has by the Act (*z*), as apparently he would have without it, the right to insure against.

Liabilities under Passenger Acts.

AMOUNT OF INTEREST INSURABLE.

Having considered what things may be insured, and by whom, we are next to inquire, to what amount. And here it may be convenient to consider, first, apart from authority, what are the true principles, and secondly, to what extent those principles have been adopted into the law of England.

(*y*) *Xenos* v. *Fox*, L. R. 3 C. P. 630, at 635. It is so completely distinct, that the sue and labour clause in the body of the policy cannot be applied to the collision clause (*ib.*).

(*z*) 18 & 19 Vict. c. 119, § 55.

The true principles.

§ 30.—Whatever is insurable, we have seen, is, and is only, insurable because and so far as it is an *expectation,*—an expectation of gain depending on the safety, or of loss which would follow the destruction, of some thing exposed to sea-hazard. This is true, not merely if the interest be in its nature an expectation and nothing else, as in the case of freight, profit, or the like, but though it be the ownership of a substantial thing. I have an insurable interest in my ship, or my merchandize, only because and so far as I have an expectation of gain, depending on its safety.

Principle: amount expected at time of insuring.

The amount insurable must be, then, on true principles, the *amount expected.* It must be the amount which is expected *at the time of insuring,* since it is then that the contract is defined. The assured proposes to himself at that time to make a definite contract, paying a fixed price for an indemnity, the amount of which is to be thereupon determined at once. Even if, as a matter of convenience, the amount of interest being then unknown, the assured should prefer to insure a larger sum, with the condition that the amount of interest should be defined thereafter, and the surplus of premium refunded, still it is necessary that the principle on which the amount is to be eventually determined shall be such as may serve equally for the case of total loss or of safe arrival, since the contract is to serve for either case. In every case, therefore, the true basis of insurable interest ought to be, the amount of the expectation, either at the time of the insuring, or at the commencement of the risk,—two periods which may practically be taken as coinciding.

This means, the then estimated value at the end of the adventure.

Now the value, at the outset of a voyage, of an expectation which depends on the safe performance of it, clearly is that which, according to the best estimate which can then be made, that expectation will be worth *at the end of it.* This is, theoretically, the right standard of valuation. If I insure my ship, and wish, if she is lost on her voyage, to be placed in the same pecuniary position as if

she had not been lost, I must consider how much the ship will probably be worth at the end of her voyage, taking account of the natural wear and tear she will have suffered, that she will be so much older, and that a quantity of her stores will have been consumed. If I, in like manner, insure my goods, I must consider, not what they have cost, but what mercantile profit I ought reasonably to expect, taking account of what I know concerning the state of their intended market, at the time when I resolve on making the shipment, and deducting the duties, freight, and other charges which I must incur. Only in this way can I obtain an exact indemnity. And so of anything else I have to insure. My interest consists in my expectation, so far as I can at this point of time determine it (*a*)

If, as often happens, there is something uncertain or speculative in my expectation: if, for example, the amount of it may be enhanced or diminished by fluctuations in the market, which I cannot at present reckon on : all this I must leave out of sight. It is necessary to define my contract now; and I must take my chance, whether the market shall rise, so that a safe arrival will be more profitable to me, in spite of insurance, than a total loss, or fall, so that an arrival would be the worse of the two. If I act thus, I shall at least be completely indemnified for my expectation, such as it now is : for I expect a fair profit on my outlay, otherwise I should not ship the goods ; and I know that I am liable to the risk of a fall in the market, and that this is a thing I cannot directly insure against (*b*).

(*a*) Should there be a rise of market after the shipment, the assured can of course secure this fresh expectation, by an increased insurance on his goods at a higher valuation. If he does so, it is not necessary to alter the valuation in the original policy, for the reason given in § 32.

(*b*) No possible marine insurance will enable the assured to recover from underwriters a loss caused by a fall in the market when the goods *arrive ;* if the goods are lost, and the market falls before they could have arrived, and the insurer pays the value of the time of shipment, it may be said that he indirectly

In a perfect system of insurance law, then, the amount recoverable in case of loss would in every case, unless it had been agreed by the parties beforehand, be regulated on this principle. It would be ascertained, by the best practicable means, what was the true value of the expectation at the time of insuring; and, in the generality of cases, there would be no great difficulty in doing so (*c*).

§ 31.—But a more practical question is, how far is this true of the law of England.

The English law, so far as it is to be gathered from decisions of the courts, was settled, as regards the basis of amount recoverable on an unvalued policy, by decisions of the period of Lord Mansfield and Lord Ellenborough, and has not been disturbed since; nor yet, it must be added, has been much acted on, at least during the last thirty or forty years, owing to the prevalence of agreed valuations. The law was thus settled at a period when the deference to mercantile custom, in matters of insurance, was at its height. It was avowedly borrowed from the then practices of merchants; which, in their turn, were borrowed, as to this matter, from the *Guidon de la Mer* and the *Ordonnance of Louis XIV.*; and these, as we have seen, were dominated by the maxim *nemo debet locupletari alienâ jacturâ*, which was construed in such a sense as to limit insurable interest to the prime cost of the thing insured, and hence absolutely to interdict the insuring of freight or profit. These old decisions of our Courts thus regulate the amount of insurable interest on principles wholly in-

pays to the merchant his loss by the fall of market. To this extent insurance falls short of one ideal perfection, viz., the making it immaterial to the assured whether his goods arrive or are lost; but this perfection could only be attained by sacrificing the other requisite, viz., that the rise or fall of the market should be immaterial to the insurer (see Intr.).

(*c*) Now that there are telegraphs almost everywhere, there can seldom be a difficulty in determining the net market value at the port of destination, as known at the time of shipment; and this is really the basis of expectation which induced the adventure.

compatible with the more modern English doctrine concerning the kinds of things which may be insured.

According to these decisions, the amount recoverable in case of total loss under an open or unvalued policy is, for merchandize, the prime cost, including the expense of shipment, and the premium and charges of insurance (*d*); for the ship, its value at the outset of the voyage, including the outfit, stores, and provisions for the crew, their advance wages, and the premium and charges of insurance (*e*); and, for freight, the gross amount of freight expected together with the premium and charges of insurance (*f*). **Present rules of English law on the subject.**

The defectiveness of these rules is obvious. A merchant is not really compensated by a refund to him, after an interval of time perhaps considerable, of the bare amount he has expended in the purchase of his goods: at least some allowance should be added for loss of interest. Again, regard should be had, not merely to the cost, but to the state of the market for such goods at the place of shipment: since it may happen, if the goods have been **Defectiveness of these rules.**

(*d*) *Lewis* v. *Rucker*, 2 Burr. 1167; *Usher* v. *Noble*, 12 East, 647. The adding of the premium presented a little arithmetical difficulty at first, in the continual addition of premium on premium. It is lawful, says the Guidon, to insure the premium upon the premium: "as, if to insure 1,000 livres at 15 per cent. requires 150 livres, it is lawful to insure the said 150 livres, and to put into the line of account 22 livres 6 sols for the cost of insurance, and so downwards from the larger to the smallest sum." (Chap. 2, Art. 9, 2 Pard. 381.) In process of time it was discovered by some ingenious arithmetician that the sum total of this series was equal to the capital sum or invoice multiplied by one hundred and divided by one hundred minus the percentage of premium. This process is called *covering*.

(*e*) *Shawe* v. *Felton*, 2 East, 109. See *Forbes* v. *Aspinall*, 13 East, 323, at pp. 329, 330. Stevens on Average, p. 190: Benecke, 45.

(*f*) *Palmer* v. *Blackburn*, 1 Bing. 61; *Forbes* v. *Aspinall*, 13 East, 323. It is to be observed that with regard to adding the premium to the *freight*, the sole reason given for doing so is a dictum by Lord Ellenborough that an owner "has increased the original amount and value of his risk by the very act of insuring!" (*Usher* v. *Noble*, 12 East, 647.) As if insurance were anything more than the transference of the risk from one person to another!

purchased some time previously to the inception of the risk, that at the time when the contract of insurance is entered into they were worth to the assured considerably more than their cost (*g*). With regard to the ship, the rule of taking her value at the time of sailing, with all her stores intact, and adding the cost of insurance, was no doubt quite right in times when the insurance of freight was not permitted: because the stores are to be expended, the advance of wages to the crew incurred, the wear and tear undergone, and the premium of insurance paid, in the expectation of replacing those outlays by the ship's earnings; but to permit these outlays and likewise the earnings to be insured, is virtually to insure the same thing twice over. Lastly, as to the freight, leaving aside the question whether the gross or the net freight should be taken account of (*h*), to add the premium of insurance to the gross freight is to make the assured to that extent better off in the event of loss than in that of safe arrival. For merchandize, it is true, it is right to add the premium to the prime cost, because the premium is a part of the

(*g*) If the *cost* be the true standard of value, we might have this absurdity, that a merchant buying two parcels of the same commodity, one before and the other after a rise of market, and sending both in the same ship to the same place, would, though these parcels were, at the time of insuring, and at every point of time subsequently, bale for bale of equal value to him, be paid, in case of loss, as though they were unequal. This difficulty is noticed by Emerigon (ch. 9, § 4, p. 275).

(*h*) As a rule, the best course for a shipowner is, to insure the gross freight, and to value the ship at her worth at the *end* of the voyage. One reason is, that if the ship is lost near the end of the voyage, after all the expenses of earning it have been incurred, the gross amount of freight may be lost; so that an insurance on the net freight, or clear profit of the voyage, would not be sufficient. If the owner recovers his gross freight, and the ship's value at the end of the voyage, after her stores have been expended, he recovers all that he has lost. If there is no freight to insure, as in the case of a ship going out in ballast to seek a cargo, it may be judicious to value the ship at what she was worth at the outset of the voyage, or perhaps even higher; for the owner, in sending the ship on such a voyage, must suppose that she will, in one way or other, be somewhat more valuable to him at the port of intended loading than she was at home.

absolute outlay, and will or ought to be restored in the market price at the place of destination; but to add it to the gross freight is a mere blunder, founded on a mistaken analogy.

EFFECT OF VALUATIONS.

But if these rules for unvalued policies are defective, no great harm is done, since unvalued policies have practically ceased to exist. It is allowable to insert in the policy, at the time of insuring, a valuation which shall thenceforward not be open to question. The liberty to do this, though it may to a certain extent trench on the prohibition of wagering in insurances, has long been recognized by our Courts in the most unqualified manner. And the convenience and usefulness of it are so great that valuations may now be said to be universal. Valuations in policies.

§ 32.—The only grounds on which a valuation inserted in the policy can be disturbed, are those of fraud and mistake. If the valuation is so excessive as, when taken in conjunction with other circumstances, to satisfy a jury that it was made with intent to defraud the underwriters, —*e.g.*, as part of a scheme for the wilful wrecking of a ship,—not only will the valuation not stand, but the insurance itself will be wholly void (*i*). And in case of clearly proved mistake, as where there is a valued policy on freight, and it can be proved that the valuation was intended to represent the *entire* freight, whereas a portion of the freight had been prepaid and therefore was not insurable, such mistake must be rectified (*k*). Valuations only to be questioned in case of fraud or mistake.

But, excluding fraud and mistake, a valuation may be greatly in excess of the real worth of the thing insured, and yet hold good. In a case not reported, where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo, Not, on account of mere excess.

(*i*) *Haigh* v. *Delacour*, 3 Camp. 319.

(*k*) *Williams* v. *North China Ins. Co.*, 1 C. P. D. 757.

valuing it at 11,000*l.*, and by chance she was loaded with palm-kernels, worth only some 3,000*l.*, which were totally lost on the way home, he was allowed to recover the whole 11,000*l.* (*l*). In another case, where a ship valued at 20,000*l.* was burnt in a graving dock, and had suffered extensive damage on a previous voyage not covered by the policy, which had not been repaired at the time of the fire, so that her actual value at that time was considerably less than the owner must have supposed it to be when he insured her, he was nevertheless held entitled to recover the whole 20,000*l.* (*m*). But a still more striking case is that of the ship *Sir William Eyre*, which was in like manner totally destroyed in a dry dock before the repairs were commenced, but after an estimate had been made of the cost of them, which showed that the damage suffered under a previous policy was so extensive that the ship, at the time when the new policy attached, was not worth repairing; notwithstanding which the underwriters on this new policy were held liable to pay the full amount of the valuation (*n*).

The result is that a policy value is, as it has been described by Willes, J., "a conventional sum not representing the real value of the vessel" [or thing insured], "but the sum to be paid by the underwriters in the event of a loss" (*o*). If the whole thing insured is lost, the amount it is valued at is to be paid without further question. Herein marine fundamentally differs from fire insurance, and may give far more than an indemnity for the real loss.

The expediency of this rule has been sometimes questioned, and attempts have even been made, in very recent

(*l*) *Company of African Merchants* v. *Liverpool Marine Ins. Co.* The case is to be found in Mitchell's Maritime Register, vol. 15, p. 914, and vol. 16, p. 145.

(*m*) *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.

(*n*) *Barker* v. *Janson*, L. R. 3 C. P. 303.

(*o*) In *Lidgett* v. *Secretan*, L. R. 6 C. P. at p. 628.

times, to set limits to it by legislation. It has been regarded as a temptation to carelessness, if not fraud. Those who are most familiar with the practical working of the rule will be the least apt to join in agitation for a change. Fraud and gross carelessness in the conduct of maritime commerce are certainly the exception and not the rule; while anything that should hinder the prompt and secure settlement of losses, substituting litigation or compromise, would be a great and everyday mischief. "This point," says Mr. Justice Willes, "has been the subject of much discussion and criticism both by lawyers and legislators; and yet nobody has been able to improve upon the practice as to valued policies which has been recognized and adopted by shipowners and underwriters. . . . . It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case; and its abandonment would in the end, as it seems to me, prove highly detrimental to the interests of the underwriters" (*p*).

§ 33.—It is to be observed, however, that to entitle the assured to recover the full amount of a valuation, it must be shown that what is lost is the whole of that to which the valuation was intended to apply. Thus if I insure and value my freight, intending the valuation to represent the freight of a full ship, and if my ship is lost while only partially laden, and before the remainder of the cargo has been contracted for, I can only recover such a proportion of my valuation as the freight on board bears to the freight of an entire cargo (*q*).

(*p*) *Lidgett* v. *Secretan*, L. R. 6 C. P. at p. 627.

(*q*) *Forbes* v. *Aspinall*, 13 East, 327. If the materials for making a rule of proportion in such a case do not exist,—as for instance when there is a valued policy on a cargo of African produce, to be obtained by barter, and the ship is lost while partially laden, and while it is uncertain whether she would have been filled up with ivory and palm-oil or with produce of much less value, the policy-valuation must be disregarded, and the underwriters simply pay the actual value of the produce lost with the ship. (*Tobin* v. *Harford*, 32 L. J. (C. P.) 134; 34 L. J. (C. P.) 37.) But when the materials for the calculation are

§ 34.—Further, a valuation is only conclusive as between the assured and underwriters on the particular policy. Hence, if I have a policy for 1,500*l.* on a ship valued at 9,000*l.*, and another for 8,000*l.* on the same ship valued at 8,000*l.*, and the ship is totally lost, the underwriter on the former policy cannot refuse payment on the ground that I have already received from the latter set of underwriters the full value of my ship, because the valuation in the other policy is nothing to him; though he may refuse to pay more than 1,000*l.*, because I have already received 8,000*l.*, and the ship, as between him and me, must be taken to be only worth 9,000*l.* (*r*).

APPLICATION OF INTEREST TO THE POLICIES.

§ 35.—What remains, in order to complete the subject of insurable interest, is, to explain the practical working of these rules; that is to say, to point out in what manner these rules determine the amount payable in case of loss, and the amount to be refunded by the underwriter in certain cases for return of premium.

This whole subject is merely the expansion of the following four principles:—1. A man may insure in the first instance as large or as small a sum as he pleases, and he pays for it in advance (or, is supposed to pay,) a premium of so much per cent. on whatever sum he thinks proper to

there, the valuation should be the basis: thus, if one-half of the cargo is on board, one-half of the policy-value should be paid.

So, if it is clear that the valuation was intended to apply to the entire freight, whereas a portion only of the freight was at risk, the sum payable must be reduced in proportion; and in doing so the principle of the valuation must be respected. If the freight actually is 5,000*l.* and is valued in the policy at 6,000*l.*, and one-half has been prepaid and so is not insurable by the shipowner, the claim under the policy is 3,000*l.* (*Williams* v. *North China Ins. Co.*, 1 C. P. D. 757.)

(*r*) *Bruce* v. *Jones*, 1 H. & C. 769. As to the effect of a valuation upon matters collateral to the determining of the amount payable by underwriters, see the judgment of Lord Selborne in *Hickie* v. *Rodocanachi*, 7 Ap. Ca. 333, at 335.

insure; but before he can make a claim on his underwriters, of whatever kind, the amount which he *ought*, or has a *right* to insure, must be determined, and his actual insurance is thus divided between the available and the useless portions. The available or valid portion then remains to form the basis of a settlement, while the useless or invalid portion is treated as non-existent, and the premium on that portion is returned to the assured. 2. The assurance may be effected either by one or several policies; and, speaking generally, the settlement is to be so arranged, that it shall be immaterial to the assured, supposing he insures the same sum on the whole, whether he has done so by one policy or by several; just as it is immaterial whether the policy is subscribed by one company or by a score of private underwriters. 3. As between the several policies or sets of underwriters, the rule is that, provided there be no inequality in the conditions under which they have respectively taken the risk, each shall share premiums and losses equally, in the proportion in which each has subscribed. 4. Return of premium, where there has been no fraud or breach of law, is made wherever *no* risk has been run by the underwriter, and this either in respect of the whole or any part of the sum subscribed for; but if *any* risk has been run, though a much smaller risk than that originally contemplated,—as in the case of a voyage, which through some change of plan has been abandoned at the outset or before any large part of the risk has been run, the underwriter is entitled to retain the whole premium (*s*).

§ 36.—The first of these four principles operates as follows:—Supposing the whole insurance to have been effected by one policy, and that a claim, whether for total

(*s*) To this rule there is, theoretically at least, an exception—viz., where there is a *custom* to make a return of a portion of the premium, as was formerly the case with insurances on ships warranted to join convoy, when they had sailed to join the convoy and had missed it: (see cases cited in Arnould, Ins. 2nd edit., p. 1210–1213), such a custom will be treated as binding. This, however, is now quite obsolete.

or partial loss, arises; the first thing to be done is to determine what is the amount of insurable interest, the method of doing which has been set forth in the preceding sections. Then, if the amount of interest is less than the amount insured, the underwriter is to pay the whole claim, be it for total or partial loss, and to return the premium on the short interest; that is to say, on the excess of the sum insured over the amount of interest. If on the other hand the amount of interest is more than the amount insured, then the claim on the policy is to be reduced in proportion: the effect of which is that, while in case of an absolute total loss without salvage the underwriter simply pays the sum insured, in every other case, whether of partial loss or of total loss with salvage, the amount payable by the insurers bears the same proportion to the total claim as the sum insured bears to the amount of insurable interest (*t*). It must be added that, supposing there is no claim at all for loss under the policy, it may still be necessary to inquire as to the amount of interest, in order to determine any right there may be to a return of premium.

§ 37.—The second of the four principles operates as follows:—If one and the same interest is insured by more policies than one, these policies are, for the purpose of determining the aggregate amount claimable, whether for total or partial loss, to be amalgamated, and treated as

(*t*) For example: suppose 5,000*l.* be insured, and the insurable interest is found to be 4,000*l.*, and the claim for a partial loss to be 400*l.*, then the underwriters pay 400*l.*, and return the premium on 1,000*l.* If, instead of 4,000*l.*, the interest is found to be 6,000*l.*, the underwriters pay five-sixths of 400*l.* In this way the risk is made proportional to the amount on which premium is paid: for example, as the risk of partial loss on goods to the value of 2,000*l.* may be suppose double the same risk on similar goods to the value of 1,000*l.*, then if premium has been paid on each parcel to the extent only of 1,000*l.*, the rule which makes the insurer of the first parcel pay one-half the damage, and the insurer of the second pay the whole, places both on an equality of liability, as they ought to be, having both received an equal amount of premium.

one. Supposing the aggregate amount insured to exceed the amount of interest, the assured has the option of making his claim under whichever of the policies he pleases, in the same way as if the other policies did not exist, but still so as not to recover more upon the whole than if all had formed one insurance (*u*). This privilege he has, because he is not to be placed in a worse position by reason of having insured too much. The option here spoken of, however, only exists when the several policies are on an equality with one another in respect of the order in which they have taken the risk; a matter which will be explained more fully in the following section; for, if one policy has at any time stood alone upon the risk, it must take priority of the others in every respect.

§ 38.—The third of the four principles operates as follows:—When the assured has collected from the several policies all that he is entitled to, any inequality is to be set right by a contribution amongst the policies themselves (*x*). This contribution is to be so arranged that the several underwriters shall eventually pay the same

(*u*) For example, suppose a merchant to have insured 3,000*l.* by one policy, and 2,000*l.* by another, on cotton, and that the insurable value of his cotton on board is 4,000*l.*, and the loss on it 400*l.*, the merchant is to recover on the whole 400*l.* and a return of premium on 1,000*l.*, just as if he had one policy for 5,000*l.*: but he may at his option claim from one policy three-fifths, and from the other two-fifths of this total; or may claim from either policy as if the other policy did not exist, and then apply to the other policy for the balance.

(*x*) *Newby* v. *Reed*, 1 H. Black. 416. For example, in the case supposed in the preceding note, if the entire claim for loss and return of premium be supposed to be 450*l.*, of which the assured has elected to claim 330*l.* from the policy for 3,000*l.*, and 120*l.* from the policy for 2,000*l.*, the 450*l.* is to be divided in the proportions of three and two, giving 270*l.* and 180*l.*, and the underwriters of the 2,000*l.* policy are to pay the difference, 60*l.*, to the underwriters of the 3,000*l.* policy. Where there is a double insurance, in short, it is like having two securities: a man may elect which he pleases, but when he has recovered his whole debt from one, he can get no more, and the position of the two securities must be equalized by a contribution amongst themselves. (*Godin* v. *London Assur. Co.*, 1 Burr. 490, at 492.)

proportion of the entire claim, subject to the following exceptions:—First, if the thing insured is valued at a larger sum in one policy than in the other, the assured, being at liberty to claim under either policy, is entitled to the higher valuation: then it is only the lower valuation which is doubly insured or insured in excess, and it is only to that extent that there can be a contribution amongst the insurers. Secondly, if any one insurance has at one time stood alone upon the risk, so that it might have happened that those underwriters would be called on to pay a total loss, their entire premium is earned once for all, and it is impossible that the effecting of a later insurance, under different circumstances, shall have the effect of depriving those first underwriters of any part of their premium. Thus, where a cargo of cotton, on board a ship reported missing, had been insured for a part of its value at an unusually high premium; and at a later date, the ship having been spoken off Holyhead, a further insurance was effected at an ordinary rate; and it turned out that owing to some mistake, the sum insured on the whole was more than the value of the cotton; it was decided that on the policies first effected there could be no return of premium. If, instead of news of the ship's safety at Holyhead, news of her loss had been received, no second insurance could have been effected, and the first underwriters must have paid the total sum insured; they were, therefore, entitled to retain the price of the risk they had run (*y*).

Subject to these two exceptions, the rule in this country is, unless it is stipulated in the policies that one is to follow or succeed the other, that all the policies share alike in the interest, irrespective of the dates when they were subscribed. The later policies share the interest rateably with the older ones. In America, and indeed in most other countries, a different rule prevails, the older policy taking interest in priority to that of later date. This

(*y*) *Fisk* v. *Masterman*, 8 M. & W. 165.

difference in the laws, in a provision in itself almost purely arbitrary, is to be regretted, as leading to grave confusion when part of an interest happens to be insured in one country and part in another.

§ 39.—If the underwriters have run a risk to the full amount insured, though only for a portion of the voyage or term intended to be covered, they may retain the whole premium: and it matters not, as to this, whether the interruption which relieves them from further risk be a loss which they have to pay for, or one they are exempt from, or a mere whim or caprice of the assured, leading him to abandon the adventure intended. On the other hand, if the risk has not attached at all, so that the underwriter never could be called on for a loss, the premium must be returned; and this, whether the non-commencement of the adventure arose from some necessity, or from the mere whim or caprice of the assured (*z*).

§ 40.—In every case, then, the retaining of the premium by the underwriter is conditional on his actually running a risk; with one exception only, namely, the case of fraud or illegality. If there has been on the part of the assured or his agent anything actually fraudulent, or any intention to break the law, as the basis of the contract of insurance, the courts will not interfere to assist a guilty party to recover back the premium he has paid; not even though the underwriter has been an accomplice in the intention to break the law. Neither party has hands clean enough for him to set the law in motion against the other (*a*).

(*z*) See Park, Ins. 775.
(*a*) *Chapman* v. *Kennet*, Park, Ins. 456.

CHAPTER II.

THE EFFECTING OF THE INSURANCE.

PART I.—PRELIMINARIES TO THE POLICY.

What to insure has been the subject of the last, *how* to insure must be that of the present chapter. This may be divided under two main heads, the preliminaries to the contract, and the contract, or policy, itself.

The preliminaries consist, first, of the employment of insurance agents, whether mercantile agents or insurance brokers, secondly of the negociations which precede the drawing up of the policy, and lastly of the *slip*, or unstamped memorandum by which the terms of the bargain are set down in writing provisionally, until the policy itself can be drawn up.

MERCANTILE INSURANCE-AGENTS.

By mercantile insurance-agents, as distinguished from insurance-brokers, are understood persons employed to effect insurance in one country on behalf of the owner in another, or employed as men of business because the owner is out of business, or for some other reason prefers to do his work by deputy. We must consider, first the authority, and secondly the duties, of such agents.

Authority. § 41.—Agents must be duly authorized to insure, not merely to enable them to charge their principal with the premiums they pay, but also because, before any recovery from underwriters can be made in the event of loss,

interest must be proved (*a*), and if the assured is not interested as principal, he must prove his authority to act on behalf of one who is.

§ 42.—It is true that if an insurance has been made, in good faith, by one person on behalf of another, without authority, it is in the power of the principal, even after a loss, to ratify and ádopt the insurance, which will then hold good precisely as if it had been originally authorized (*b*). But such intending agent of course runs the risk of losing, in the event of safe arrival, the premium he has paid. It is material, therefore, to consider what is a sufficient authority. **Ratification.**

§ 43.—An agent who is bound, must *à fortiori* be authorized to insure. There are three cases, it has been laid down, in which a mercantile correspondent of the owner of property is bound to obey an order to insure: 1st. where he has funds in hand belonging to him who gives the order; 2nd. when he has been accustomed, in his ordinary course of dealing with the principal, to receive and execute such orders, and has given no notice to **In what cases agent bound to insure.**

(*a*) *Cousins* v. *Nantes*, 3 Taunt. 513; and see Stat. 8 & 9 Vict. c. 109, § 18, with reference to foreign ships.

(*b*) This is in conformity with the old law-maxim, "*omnis ratihabitio retrohabitur et mandationi equiparatur.*" (See *Routh* v. *Thompson*, 13 East, 274; *Hagedorn* v. *Oliverson*, 2 M. & S. 485.) In a recent case, an attempt was made to obtain a reversal of these decisions in the Court of Appeal: but the Court held that, admitting that for general purposes the rule might be good that "there could only be a ratification when the principal could himself make the same contract as that ratified," yet with respect to marine insurance there might be an exception. "When a rule has been accepted as the law with regard to marine insurance for near a century," said Cockburn, C. J., "I do not think we ought to overrule it lightly, because insurances have probably been effected on the basis of the law that has so become settled, and mischief might arise from the disturbance of it. Moreover, I think that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract." (*Williams* v. *North China Ins. Co.*, 1 C. P. D. 757, at p. 764, and see p. 766.) As to what amounts to a ratification, see Arn. Ins. 163—165.

discontinue; 3rd. when bills of lading have been sent to him with orders to accept them and insure the goods, and he does accept the bills of lading (*c*). The reason for the first of these rules is, not that in a general way one who has in his hands money belonging to another is necessarily bound to lay it out in whatever manner the latter may direct, and certainly not that he is bound to do so in such a way as to impose on himself a fresh trust: for example, a lawyer is not bound to apply the moneys of his client to the purchase of goods, nor a merchant those of his correspondent to the purchase of lands: but that it is part of the ordinary business of a commission merchant, when ordered to insure, and supplied with the requisite funds, to execute such orders (*d*). Thus the first and second of these rules may be brought under the more general head: one whose business and habit it is to perform for another a certain function, is bound either to go on doing the same, or give his principal timely warning before discontinuing it. As for the third case, the transaction is entire, and the correspondent, adopting one part, virtually binds himself to the whole.

Can an agent be authorized by implication, yet not obliged to insure?

§ 44.—Whether there is any case in which a mercantile agent, though not expressly ordered, nor yet bound to insure, may yet be authorized to do so by implication, so that he can charge his principal with the premium, appears questionable. Cases in which the agent has himself such an indirect interest as would give him a right to insure as principal, of course do not come in question here. A mere shipper, as such, or a mere consignee, as such, is generally understood to have, in the absence of custom or previous dealing, no implied authority to insure (*e*). It may be doubted whether a custom of any particular trade, for a mere agent to insure, where he has no orders, and no personal interest, could be proved (*f*). Practically, the

(*c*) *Smith* v. *Lascelles*, 2 T. R. 187.

(*d*) 2 Duer, Ins. 126.

(*e*) See 2 Duer, Ins. 108.

(*f*) See 2 Duer, Ins. 127. "In the United States," says Duer, J.,

only safe way for an agent, where his principal is one with whom he has no established course of dealing, is, to obtain distinct instructions as to effecting the insurance (*g*).

§ 45.—But, whether bound or not to accept such an order, an agent who does accept it is bound to use reasonable care, pains, and skill in carrying it out; failing which, he himself, whether mercantile agent or broker, stands in the place of the underwriters in this sense, that he must make good to his principal the amount which would have been payable by the underwriters had he done his duty (*h*). **Duties of insurance agent.**

§ 46.—The degree of skill and knowledge which is required from a mercantile insurance agent, under this penalty, is so much as may be ordinarily expected in a sensible man of business, conversant with insurance in a general way, but not specially versed in its niceties (*i*). More than this is demanded from the insurance-broker. The broker, who acts as intermediary between assured and underwriter, is or ought to be an *expert* in insurance; and as such it is his duty to secure for his principals every legitimate advantage which can be obtained by technical and special skill and knowledge. Thus, from the mercantile agent are required such things as these: that he execute the order given him with exactness and fidelity, communicating to the broker all important facts concerning the risk precisely as they have reached him; that he **Extent of skill required.**

"a consignee who is not the owner never insures, unless by express direction, or when he has accepted bills, or otherwise made advances on account of the consignment; and such it appears from Benecke and other writers, is the general usage on the continent of Europe." (2 Duer, 107.)

(*g*) The managing owner of a ship, though but a part-owner, has an implied authority to insure the whole freight; indeed, he usually has a lien on it for disbursements: but not, as such, to insure the whole ship; a share in a ship being a distinct property, which the proprietor usually insures separately. (*French* v. *Backhouse*, 5 Burr. 2727.)

(*h*) See Arn. Ins. 182.

(*i*) *Per* Tindal, C. J., in *Chapman* v. *Walton*, 10 Bing. 63.

use due diligence to have the order executed, not necessarily confining his efforts to the place where he may reside, but, in case of inability to obtain the insurance there, trying London or other places (*k*); that he use good judgment in not limiting the broker too strictly as to premium (*l*), or insisting on unusual and impracticable clauses; and that, in case, after all, his efforts to obtain an insurance prove unavailing, he forthwith report his ill-success to his principal, so as to give him the opportunity of taking the needful measures himself (*m*). From the broker are required such as these: to communicate to the underwriters, at the time of insuring, every fact material to the risk which has been made known to him (*n*); to insert in the policy all such special clauses as are customary and needful for the protection of the assured (*o*); to see that the policy is in right form and duly stamped (*p*); and generally to obtain for his principal the best terms which are practically within his reach, using for this purpose due diligence to make inquiries, *e.g.*, as to the rates of premium charged for such risks in the several offices, as to the credit of particular underwriters, and the like (*q*).

(*k*) See *Smith* v. *Cologan*, 2 T. R. 188; 2 Duer, 242—244; 2 Phill. § 1890.

(*l*) *Wallace* v. *Tellfair*, 2 T. R. 188, n.

(*m*) If an agent thinks proper to refuse to execute an order to effect insurance, he is bound forthwith to notify such refusal to him who gave the order, that he may arrange as to employing some other agent. (*Smith* v. *Lascelles*, 2 T. R. 188.)

(*n*) *Seller* v. *Work*, 1 Marsh. Ins. 243; 2 Duer, 202; *Maydew* v. *Forrester*, 5 Taunt. 615; *Wake* v. *Atty*, 4 Taunt. 493; *Campbell* v. *Rickards*, 5 B. & Ad. 840.

(*o*) *Mallough* v. *Barber*, 4 Camp. 150; *Chapman* v. *Walton*, 10 Bing. 57. For example, since it is necessary, when goods are insured for a part of the voyage only, *not* beginning the adventure from their loading, to show this on the face of the policy (*post*, § 73), a broker who had omitted to do so was held personally answerable for his neglect. (*Park* v. *Hammond*, 6 Taunt. 495.) But a broker is only expected to know such points of law as are clearly settled; he may pardonably be mistaken as to matters wherein lawyers doubt. (2 Duer, 214; Arn. 176.)

(*p*) *Turpin* v. *Bilton*, 5 Man. & Gr. 455.

(*q*) *Hurrell* v. *Bullard*, 3 F. & F. 445; see Duer, Ins., vol. 2, pp. 229—232.

All preliminary negotiations, then, as to the rate of premium and general conditions of the insurance, are usually conducted by the broker; who likewise has to see to the filling up of the policy and obtaining the signatures.

The Slip.

Since the preparing of a stamped policy may occupy some time, whilst the assured often needs to be protected at once, it is usual for the broker to furnish a *slip* or *covering-note*, not stamped, briefly setting forth the main conditions of the contract, and initialed, at Lloyd's, by the underwriters.

Slip cannot be sued upon.

§ 47.—This slip is not itself an instrument of contract which can be sued upon in a court of law; nor can it, like an agreement for a lease, be made the basis of proceedings either in law or equity to compel the underwriter to furnish a policy. This is precluded by the terms of the Statute 30 Vict. c. 23, §§ 7 & 9, which enact that no contract or agreement for sea insurance shall be valid unless expressed in a policy, and no policy shall be pleaded or given in evidence or admitted to be available in law or in equity, unless duly stamped; and it was, until recently, necessary that it should be stamped before being signed or underwritten (*r*).

But is binding in honour.

The slip, however, is, in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium; and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business (*s*).

(*r*) *Fisher* v. *Liverpool Marine Ins. Co.*, L. R. 8 Q. B. 469; 9 Q. B. 418. See *post*, s. 83, n. (*k*), as to the possible effect of the Stat. 39 Vict. c. 6, § 2, which permits the affixing of a penalty-stamp to a policy.

(*s*) *Per* Blackburn, J., in *Ionides* v. *The Pacific Ins. Co.*, L. R. 6 Q. B. 674, at 684. "A contract,"

May be given in evidence for some purposes.

The slip may be given in evidence in order to prove the intentions of the parties at the time of entering into the engagement, or wherever such evidence may be material for any purpose short of enforcing it as a contract (*t*).

No communication need be given after slip signed.

Since, as it has been pithily expressed, no one is bound to lead his neighbour into temptation, no assured or agent of an assured who receives intelligence of the ship's loss, or other news that affects the risk, between the initialing of the slip and the issuing of the policy, is bound to communicate it to his underwriter (*u*). If he were to do so, he could confer no real advantage on the underwriter, for the only effect could be, to give the latter a chance of acting dishonestly.

PART II.—THE POLICY.

§ 48.—The *policy* or *promise* (*pollicitatio*, Ital. *polizza*) of insurance is an undertaking on the part of the insurers, in consideration of a premium received, to bear and take upon themselves certain specified perils. Thus it may be described as a sort of promissory note.

As for the form of it, it has been called "hardly in-

says Cleasby, B., "is constituted by the concurrence in intention of two persons, the one promising something to the other, who on his part accepts the promise; it is binding at the time when the two parties separate with that idea in the mind of each: the idea of the one being, 'I promise,' and of the other 'I accept' . . . . The particular evidence or mode of expression required by the statute to make it enforcible at law is a different matter. But to add that expression is a matter of obligation, a thing required, not by any arbitrary code, as the use of the term honour would seem to signify, but by conscience and the sense of right prevailing universally, and under the influence of which all the transactions of life take place" (in *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Exch. at 60).

(*t*) *Cory* v. *Paton*, L. R. 7 Q. B. 304, at 310; *Lishman* v. *Northern Maritime Ins. Co.*, L. R. 8 C. P. 216, at 225.

(*u*) *Ionides* v. *Pacific Ins. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517; *Cory* v. *Paton*, L. R. 7 Q. B. 304; 9 Q. B. 577; *Lishman* v. *Northern Maritime Ins. Co.*, L. R. 8 C. P. 216; 10 C. P. 179; and see *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Ex. 40.

telligible" (*x*), "absurd and incoherent" (*y*), "a very strange instrument" (*z*), "drawn with much laxity" (*a*), and yet merchants and underwriters cling to it, as Mr. Arnould says, "with persevering tenacity." The ordinary or Lloyd's form is said to be (with the exception of the memorandum at the foot,—a modern addition of the year 1745) the same as that first introduced into this country, along with insurance itself, by the Lombards (*b*); and however this may be (*c*), the existing form has certainly been in use without change for several hundred years, and the attempts occasionally made to introduce variations have so far met with little encouragement. This seems to show that it must be tolerably well adapted to its purpose. At any rate, the old form has the advantage of having been explained by many decisions.

Contains three distinct stipulations.

§ 49.—Examined carefully, this instrument is found to consist of three distinct engagements or stipulations. The first and principal is the promise, on the part of the insurers, that they will take upon themselves certain specified "perils" or causes of loss which may come to the hurt or detriment of the thing insured, which is specified, on a voyage or for a term which is likewise specified and its limits defined with some precision. The

(*x*) Arn. 231.

(*y*) *Per* Buller, J., 4 T. R. 210.

(*z*) *Per* Mansfield, C. J., in *Le Cheminant* v. *Pearson*, 4 Taunt. 380.

(*a*) *Per* Lawrence, J., in *Marsden* v. *Reed*, 3 East, 579.

(*b*) Arn. 231—232.

(*c*) This is perhaps substantially but not precisely true. The oldest form of policy I have been able to find in M. Pardessus's collections is one set forth in a Florentine ordinance of 1523, which I give in the Appendix. A comparison of this formula with the present Lloyds' policy shows many striking points of resemblance, and perhaps our form may be an improvement on this model. The adoption of one common printed form, with blank spaces for particulars to be filled in, is itself an improvement on the original method, which seems to have been retained in France after it had been abandoned by the Lombard merchants. This older practice was to employ notaries, *greffiers*, or other skilled persons, to draw out instruments of insurance adapted to each particular case. A specimen may be found at the end of an edition of the *Guidon de la Mer*, dated A.D. 1629, (2 Pardessus, 430).

second part is what is called the "sue and labour clause," which is an encouragement to the assured to use exertions about the saving of his property when in peril, by a promise to contribute to the expenses he may thereby incur. And the modern addition, the memorandum, sets a limit to these two promises, by exempting the insurer, except in events therein named, from claims below a certain percentage, or from claims for damage to some kinds of goods which are regarded as exceptionally hazardous. If each of these three parts is viewed by itself, the "promise" will be found to be tolerably plain and simple.

Division of subject.

§ 50.—Beginning with the first of these promises, it will be convenient to go through its several terms, one by one, in their natural order, dealing completely, and once for all with those of them which lie in small compass, and reserving for a more detailed inquiry those which are too large to be dealt with thus summarily. In this way every part of our subject will stand in its proper place, and can at last be grasped as together constituting an organized whole.

The promise is given to a person named; it is given whether the thing insured is at the time lost or not lost; it has relation to a subject-matter or thing which must be specified; this thing is at risk in or with a ship, under the command of a master, both named; it is for a voyage or term to be marked out, together with the precise point at which that voyage or term commences and terminates; the amount of liability may be fixed by a valuation; and lastly, it is a guarantee against loss from certain specified perils. These, therefore, are the several points to be attended to; and they may all be dealt with in the present chapter, with the exception of the perils insured against, a topic which will require a separate examination.

Name of the Assured.

§ 51.—The first clause in the printed policy is as follows:—"*Be it known that* , *as well in*

his [or their] own name, as for and in the name of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause and them and every of them to be insured."

These words imply that some name must be inserted (*d*); that it matters not whether it be the name of the principal or of his agent or broker; that the specific nature of the assured's interest in the thing insured need not be described (*e*); and that the policy may enure to the benefit of a future transferee of the interest. And each of these propositions has been, in one way or another, established by law (*f*).

"Lost or not lost."

§ 52.—The insertion of these words, which immediately follow, provides for the case of a ship or cargo being lost at sea, unknown to either party, at the time of insuring; preventing the raising of any cavil, such as that at the time there existed nothing to insure, or that the insurance was intended to provide for the future only, and not for unknown losses in the past.

It is now settled that, provided the two parties, insurer and assured, are on an equality, no matter whether as both knowing or both ignorant of the fact, a policy "lost or not lost" must hold good, although at the time of effecting it there were in fact no risk to be run, either because the ship had been lost, or because she had arrived safe at her destination. In the former event the insurer must pay; in the latter he is entitled to retain his premium (*g*).

(*d*) This is necessary by statute: 28 Geo. 3, c. 56, and 30 Vict. c. 23.

(*e*) *McKenzie* v. *Whitworth*, L. R. 10 Exch. 142; 1 Ex. D. 36.

(*f*) Arn. Ins. 234—235. By Stat. 31 & 32 Vict. c. 86, § 1, an assignee of a policy may in certain cases sue in his own name on the policy. And see Stat. 36 & 37 Vict. c. 66, § 25 (6).

(*g*) *Bradford* v. *Symondson*, 7 Q. B. D. 456.

The Voyage or Limit of Time.

§ 53.—Next come the words "at and from," with a blank space intended to be filled up, in the case of a voyage-policy, by the names of the places the ship is to proceed from and to, or, in that of a time-policy, by the days which are to limit the duration of the risk—*e.g.*, either "from London to Calcutta," or, "from the 1st of January to the 31st December, 1879."

Voyage-policies.

The voyage. The voyage must be described in such a manner that a mercantile man, conversant with the usages of trade, ought to be able clearly to understand what is intended; and the voyage, thus described, must be rigidly adhered to, except of course in the case of unforeseen necessity. The highly penal consequences of a "deviation," or unnecessary departure from the track laid down in the policy, will be pointed out in the third chapter.

Rules for describing it. The following rules for describing the voyage will probably be found sufficient for practical purposes:—

Three methods of describing a voyage. There are three ways of describing a voyage: either every port which the ship is to visit may be named; or general words may be used which cover a certain range and leave room for variations within it; or lastly, where there is a clear known custom as to the track, and that custom is intended to be followed, it may suffice to name the *termini* only and rely on the custom. Which of these methods is preferable must depend on circumstances.

The first method. § 54.—When the course of the voyage is definitely fixed at the outset, the first of the three methods is usually the best. It is then necessary to name every port at which the ship is to call on the voyage (*h*), and to name them in the order in which they are to be visited (*i*).

(*h*) *Fox* v. *Black*, Park, Ins. 620.

(*i*) *Beatson* v. *Haworth*, 6 T. R. 531; although, however, the order

This, whenever practicable, should be done in such a manner as to mark clearly which are to be the ports of loading and which the ports of discharge; *e.g.*, "at and from A. and B. to C., D., and E.," where the ship is to load part of her cargo at A. and part at B., while C. and D. are places at which, or at some of which, the cargo is to be discharged. This however cannot be laid down as a rule which it is absolutely necessary to observe (*k*).

Where same name denotes town and district.

§ 55.—In naming the *termini* of the voyage, one caution is to be observed, viz., that where the same name designates a town or place, and likewise a district comprehending several places, the name, when used in the policy, is always to be understood in the former, *i.e.*, the narrower sense. Thus, whereas Lyme is a port-town, and there is likewise a district known by the name of "the port of Lyme," which includes Bridport and other places besides Lyme, a policy "at and from Lyme," does not protect a ship which loads at Bridport (*l*). The policy, to cover it, ought to have been either "at and from Bridport," or, "at and from a place of loading within the port of Lyme."

The second method.

§ 56.—The second method of describing the voyage, viz., by general words which cover a certain range admitting of variations, must necessarily be adopted when the precise course the ship is to take is not known at the time of insuring. This may involve various complications. The port or ports of loading may be uncertain, while the port of destination is known; or conversely; or it may not be known at what places the ship is to call on the way; even all these matters may be unknown, except in a general way, or within certain limits. The principle throughout is simple: words are to be used which, under-

must not be varied, yet any port may be dropped altogether, as this must always diminish, not increase, the risk. For example, an insurance from A. to B., C., and D. would cover the risk in case the ship sailed from A., cleared with cargo for C. and D. only. (*Marsden* v. *Reid*, 3 East, 571.)

(*k*) See *Metcalfe* v. *Parry*, 4 Camp. 123.

(*l*) *Constable* v. *Noble*, 2 Taunt. 403.

stood in a mercantile sense, shall convey to a mercantile man, acquainted with the customs of the particular trade, an accurate knowledge of the full range of intended variations. The application of this principle must be a matter of judgment and experience; and it would be unprofitable to set down here anything beyond a few rules for the simpler cases, drawn from decisions of the Courts.

What is a port.

§ 57.—First, as to the port of loading. A "port" of loading is understood to be a place frequented by ships for the purpose of loading, and at which ships usually load cargoes. Within such a place the ship may be moved from dock to dock, or quay to quay, and load part of her cargo in one and part in another. A "port" in this sense is not necessarily a place enclosed within quays or dock walls: it may be an open roadstead, if that be a place where ships are accustomed to load cargoes (*m*). But "a port" is not to be understood in the more extensive sense of a custom-house district comprehending several towns or places, any one of which may be considered as a port of loading in the sense above described. For example, the "port of Liverpool," for custom-house purposes, includes Runcorn: a policy at and from "a port of loading in the United Kingdom," would cover a ship loaded wholly at Runcorn or wholly at Liverpool, or one loaded partly in the Albert and partly in the Canning Dock at Liverpool, but not one loaded partly at Liverpool and partly at Runcorn (*n*). To cover such a risk, the policy should be, "at and from port or ports," and the same rules apply to the port of discharge.

Order of taking ports.

§ 58.—If the insurance is from or to a district comprising several ports, those ports must be visited in their natural or geographical order, unless there is an established custom of the trade to vary this order, in which case the customary order must be observed (*o*). If, in a particular

(*m*) *Harrower* v. *Hutchinson*, L. R. 5 Q. B. at p. 589.

(*n*) *Brown* v. *Tayleur*, 4 A. & E. 241. *Harrower* v. *Hutchinson*, L. R. 4 Q. B. 523; 5 Q. B. 584.

(*o*) *Beatson* v. *Haworth*, 6 T. R. 533; *Gairdner* v. *Senhouse*, 3 Taunt. 16; and see Arn. Ins. 461.

case, this natural or customary order is intended to be departed from, such intention should be indicated on the face of the policy, which is usually done by inserting the clause "backwards and forwards, or in any order." Of course, when the precise order intended to be observed is known, a still better way is to specify it on the policy.

The clause giving liberty to touch and stay.

§ 59.—The printed form of policy contains the clause: "*And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever*"—here follows a blank space —"*without prejudice to this insurance.*" It may be convenient here to consider the effect of this clause.

Hastily read, these words appear to give an unlimited licence of deviation; but their force is restrained by the words "*in this voyage.*" This places a twofold limit—as to track, and as to purpose.

Limitation as to track.

§ 60.—As to track, it was very early laid down in our Courts, on the authority of Lord Mansfield, that the printed clause only covers the calling at places in the usual course of the voyage between the termini named in the policy (*p*). Thus, when it was customary, on voyages from India, to touch at the Cape of Good Hope or St. Helena; or now, in the case of steamers, on voyages where it is usual to call at intermediate stations for coals; such ordinary digressions, and such only, are covered by the printed clause. Even where the force of this clause is increased by additions in writing, as, where a ship was insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever," it was held that this liberty only allowed the ship to call at a port *north* of Lisbon, *i.e.*, in the course of a voyage between Lisbon and this country, and that she must not go to Faro, which lies south (*q*). Of course, if the voyage itself has a wider scope, as, for instance, when there

(*p*) *Lavabre* v. *Wilson*, 1 Dougl. 284.

(*q*) *Hogg* v. *Horner*, Park, Ins. 626. See also *Gairdner* v. *Senhouse*, 3 Taunt. 16.

are several ports of loading, a liberty to call will have a correspondingly wider range of area (*r*).

So, if the terms of the policy clearly show that the voyage is to be pursued in an indirect manner, a liberty to call must not be thus limited. For example, where the voyage was "at and from Antigua to England, with liberty to touch at all or any of the West India Islands, Jamaica included," it was held no deviation to call at St. Kitts; because, though St. Kitts lies far wide of the direct course of a voyage from Antigua to England, it does not lie wider of it than Jamaica does; and by naming Jamaica, the underwriters were warned that the voyage was not intended to be a direct one (*s*).

Limitation as to purpose.

§ 61.—Next, as to purpose:—The purpose for which the ship calls at a port must be something within the main scope of the voyage insured (*t*). Where a ship was insured from Para to New York and back, with leave to call at any of the Windward or Leeward Islands, and land or load goods there, it was held to be a deviation to call at one of the Leeward Islands, not for any purpose connected with the voyage, but to obtain information as to the markets there, to guide the shipowner as to some future speculations in another ship (*u*).

So, a liberty to "stay and trade" on the Coast of Africa does not protect a ship during her stay there for the purpose of enabling her crew to earn salvage by saving the cargo of another ship (*x*).

Does leave "to call"

Whether liberty to call at a port gives liberty to land

(*r*) *Bragg* v. *Anderson*, 4 Taunt. 229; *Lambert* v. *Liddard*, 5 Taunt. 480; *Ashley* v. *Pratt*, 1 Exch. 257.

(*s*) *Metcalfe* v. *Parry*, 4 Camp. 123.

(*t*) See Arn. Ins. 474, and cases there cited.

(*u*) *Hammond* v. *Reid*, 4 B. & Ald. 72. See also *Solly* v. *Whitmore*, 5 B. & Ald. 45; and *Bottomley* v. *Bovill*, 5 B. & Cr. 210.

(*x*) *Company of African Merchants* v. *British and Foreign Mar. Ins. Co.*, L. R. 8 Exch. 154. The words "stay and trade" meant, it was held, "stay for trading;" and what "trading" is, must be governed by the customary meaning of the term in the African trade, which certainly does not include earning salvage.

or load cargo there, must depend on whether such an intention may fairly be inferred from the description of the voyage in the policy, taken in conjunction with the customs of the particular trade (*y*). As a rule, where the policy names several loading ports, especially if they are described in general terms, this is a warning to the underwriters that the ship's port of loading is not yet definitely settled, and hence that a liberty asked for to touch at any particular port is likely to be for the purpose of loading cargo there; and so, *mutatis mutandis*, with respect to ports of discharge (*z*). In order to avoid dispute, it certainly is better in such cases to add the words "and trade," or the like, to the liberty to "touch and stay;" but it cannot be said that this is always necessary. And wherever a ship has liberty to call at a place, she may always land or load goods there, provided this can be done without additional delay (*a*). **allow of trading?**

The third method. § 62.—Lastly, in cases where the voyage is not intended to be direct, but yet is to be conducted in a manner defined by a well-known custom, it may suffice, and may even be more convenient, to name in the policy the port of loading and of destination, and these only, in reliance on the notoriety of the custom. This method is more particularly convenient in insuring goods carried in steamers belonging to well-known companies. Such a company may have a practical monopoly of its particular trade, and therefore can frame its own customs, and these an underwriter must be presumed to know. We must go a step further: there are lines of steamers, *e.g.*, those trading to the West Indies or the Mediterranean, which have customary variations,—so that, for example, a steamer going to Venice will on one voyage call at Naples and on another at Ancona. There can be little doubt that a policy on goods by a line steamer may be safely described

(*y*) *Urquhart* v. *Bernard*, 1 Taunt. 450.

(*z*) See *Metcalfe* v. *Parry*, 4 Camp. 123.

(*a*) *Raine* v. *Bell*, 9 East, 195; *Laroche* v. *Oswin*, 12 East, 131.

as simply from Liverpool to Venice, supposing that the goods insured are to be shipped in Liverpool and landed in Venice. Such digressions are in fact covered by the ordinary printed clause, "and it shall be lawful, &c.," above referred to.

In all cases of real difficulty, care should be taken to insert what is called the "deviation clause," viz.: "Held covered in the event of a deviation at a premium to be agreed upon" (*b*).

The subject Insured.

§ 63.—The subject or thing insured is described in a manner that is peculiar. The printed form of the policy stands thus:—*Upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel.*" Then, in writing, is set down the specific thing, whether ship, goods as may be described, freight, profit, or whatever it may be, intended to be insured by this policy.

This seems at first sight, and perhaps is, a strange and clumsy contrivance for doing a very simple thing. It obliges us to apply the somewhat objectionable rule of construction, of allowing the written words to overrule, and in case of need even contradict, the printed form. The policy, in its printed form, first describes every kind of thing that can—or that at the time when such policies were originally framed could (*c*)—be insured, and then, in

(*b*) The objection to the "deviation clause" is, that an underwriter has no security of obtaining an additional premium, as he ought to do, in the event of a deviation which increases the risk but is not followed by a loss. To guard against this, a form sometimes used is the following:—"In event of deviation, held covered at a premium to be hereafter arranged, provided notice of such deviation be given to the insurers on receipt of advices." Even with this, it can only be used where there is a mutual reliance for fair and upright dealing.

(*c*) Ship and goods being originally the only things insurable.

writing, limits this general description to something more specific. Why this has been done, can perhaps now only be conjectured. Some have thought that the policy was originally framed to suit that primitive state of things, belonging to the very infancy of navigation, when it was the rule for the same man to own the ship and the whole cargo (*d*); yet this can hardly be, considering that maritime adventure had passed beyond this stage as far back as the time of the Roman law, if not long before it, while insurance is a far more modern invention. But, be this as it may, this remarkable manner of describing the subject insured is not without its advantages. It points out that although the thing insured may be an expectation, it must always be such an expectation as has in some sense a basis in solid property: it must be such as will be lost or defeated if, and only if, the ship or the goods on board, or both, are lost or damaged by the perils insured against. The specific interest of the assured, or thing which he in particular means to insure, must likewise be named, and the naming of it controls and narrows the general printed formula, so that the surplusage of it beyond that specific thing becomes unmeaning, except as indicating that the interest specified must have a relation either to the ship or the goods (*e*).

Cargo.

§ 64.—We may pass on, then, to the specific written description of the thing insured; and first, of goods and merchandize. These may be described either generally, as "*on goods*," or "*produce*," without defining the species or quality; or, on "100 bales of cotton of such a mark," or the like. It is a mere question of convenience which of these methods shall be adopted. If general words be used, a policy on "goods" covers every description of merchandize, including the hazardous kinds, *i.e.*, such as from their nature are not usually accepted by an under-

(*d*) Arn. 238.

(*e*) *Per* Lord Ellenborough in *Robertson* v. *French*, 4 East, 141; *Simmonds* v. *Hodgson*, 6 Bing. 114; s. c. in error, 3 B. & Ad. 50.

writer at an ordinary rate of premium, or unless warranted free of particular average. If an underwriter is content to insure "goods," without a particular description, he takes his chance. But, whether the description is general or specific, one thing is to be borne in mind, viz., that a policy on merchandize only covers such merchandize as is carried in its proper place, viz., below the ship's deck. Goods carried on deck are, by a very old and general custom, not protected by such a policy: it is always necessary, if these are to be insured, that some words be added, such as, "in and over all," "wherever laden," or "including deck-load," to inform the underwriter of the extraordinary risk he is to run. This is so, even in trades in which the carrying of a deck-load is the universal custom, *e.g.*, with cargoes of timber (*f*). If, indeed, the mere describing of the goods insured is enough to inform the underwriter, supposing him, as he ought to be, acquainted with the customs of trade, that it must be on deck, it is not necessary to say more. Thus, where the policy was on "carboys of vitriol," and it was proved that vitriol was never knowingly carried except on deck, the underwriters were held liable for its loss from the deck (*g*).

The ship. § 65.—A policy on *ship* covers her "tackle, apparel, &c.," as described in the policy (*h*). This includes provisions put on board for the use of the crew on the voyage (*i*). It does not however include the fishing-tackle in a whaling voyage; that is to say, the harpoons, lances, whale lines, casks, cisterns, boilers, &c., for catching and boiling down the fish; though these belong to the owners of the ship (*k*).

(*f*) *Gould* v. *Oliver*, 2 M. & G. 208.

(*g*) *Da Costa* v. *Edmunds*, 4 Camp. 142.

(*h*) "Hull and outfit," says Lord Ellenborough, "are both protected by an insurance on ship." (*Hill* v. *Patten*, 8 East, 374; *Forbes* v. *Aspinall*, 13 East, 323, 325.)

(*i*) *Brough* v. *Whitmore*, 4 T. R. 206.

(*k*) *Hoskins* v. *Pickersgill*, 3 Dougl. 222.

In applying the principles of these decisions to passenger steamers, it seems clear that the coals and engine stores, and provisions for the crew, are part of the ship; but provisions for the passengers are not, being analogous to the appliances for catching the fish (*l*). Permanent passenger fittings, which continue voyage after voyage, can hardly be distinguished from those structural arrangements of the hull, such as an enlarged saloon, lofty 'tween decks, and the like, which are made especially for the accommodation of passengers; and are therefore treated in practice as part of the ship. **Passenger steamers.**

Kentledge, or permanent ballast, is part of the ship (*m*); whether the same holds good of temporary ballast, grain platforms, or dunnage wood, intended only for a particular voyage, may be doubted; the latter are not usually so treated in practice. **Ballast.**

§ 66. In insuring freight, it matters little whether the interest is described as "freight," "freight at risk," "freight per charterparty," or the like. Freight must be either a shipowner's profit by carrying goods of his own, or the price of working for others under a contract. The former kind, it has been decided, is recoverable under an ordinary policy on freight (*n*); and as to the latter, the actual contract must necessarily, in case of loss, be referred to, in order to ascertain what was insured (*o*). Speaking generally, a policy on freight must be taken to cover all the ordinary stipulations of the contract of affreightment, whether bill of lading or charterparty. The underwriter takes his chance of having his risk increased by such ordinary variations as, for example, having half the freight prepaid, whereby a loss of one half the cargo may have **Freight.**

(*l*) The decision in *Shawe* v. *Felton*, 2 East, 109, seems opposed to this; but this case can scarcely be regarded as of authority, being clearly opposed to principles now recognized.

(*m*) *Ingram* v. *Harrison*, in Q. B. Feb. 1856.

(*n*) *Flint* v. *Flemyng*, 1 B. & Ad. 45.

(*o*) *Per* Lord Selborne, in *Inman S. S. Co.* v. *Flemyng*, 7 Ap. Ca. at 672; and see *per* Brett, J., 1 Ap. Ca. at 216.

the effect of occasioning a total loss to the insurer of the balance (*p*); or by the special clauses of a government charter, provided this is a charter long enough in use to be supposed known to insurers (*q*). But if the insurers are required to take the risk of loss resulting from the operation of a "cancelling clause" in a charterparty, it has recently been laid down that, this being a clause of comparatively recent introduction, only occasionally used, and such as may enormously increase the risk to be run, its existence in the charter is a fact which the assured is bound to disclose to the underwriter (*r*).

When the interest consists of a shipowner's profit by carrying his own goods, though this, as has been said, may with perfect propriety be insured separately as freight, yet, generally speaking, the method most advantageous to the owner is to insure it in the same policy as the goods, and to value both together, describing them as "goods including freight." The same thing applies to insuring advance-freight; it should be in the same policy as the goods, and included in one common valuation, as "goods including advance-freight."

Passage money.

§ 67.—It may be doubted whether an insurance "on freight" covers passage-money. It is more usual to insure passage-money under a distinct name, since the incidents of this risk are in many respects different from that of the freight on merchandize (*s*)."

(*p*) *Allison* v. *Bristol Mar. Ins. Co.*, 1 Ap. Ca. 209.

(*q*) *Inman S. S. Co.* v. *Flemyng*, 7 Ap. Ca. at 672.

(*r*) *Mercantile S. S. Co.* v. *Tyser*, 7 Q. B. D. at 77. See also *per* Blackburn, J., in *Allison* v. *Bristol Mar. Ins. Co.*, 1 Ap. Ca. at 231.

(*s*) See *Denoon* v. *Home & Colonial Ass. Co.* (L. R. 7 C. P. 341). This decision is not a satisfactory one. The Court held that the insurance in this case did not cover the passage-money: there was no intention to carry a full cargo: the freight on the goods was 1412*l.*, and was never expected to be more, or for a larger quantity of cargo; and this was valued in the policy at 2000*l.*, and the whole of it was lost. Only 1000*l.* was insured; and yet, strange to say, the underwriter was held to be liable for something less than 1000*l.* It is not easy to understand the grounds for this conclusion: either the valuation should

Name of the Ship and Master.

§ 68. Next comes the name of the ship and the master, with the addition, "*or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called.*"

These words protect the assured against innocent mistakes, or against a change of the master *bonâ fide* made from whatever motive. They do not dispense with the obligation that the goods shall be laden or intended to be laden in the ship thus designated, and that there shall not be a "change of bottom" without necessity. If, indeed, the original ship has been disabled through some peril, or if, for any other cause unforeseen at the time of insuring, it becomes necessary to transfer the goods insured from the original bottom to another, in order to carry them to their destination, the policy protects the goods whilst on board the substituted ship, no less than on that named.

The "bill of lading" clause.

§ 69.—It is now not unusual, particularly with steamers, to find a clause in the bills of lading empowering the owners or their agents to tranship the goods from one steamer to another, or to ship by one instead of another of the same line. In such cases it is prudent, though perhaps not absolutely necessary, to insert in the policy some such clause as "*subject to the conditions of the bill of lading.*" This may not be necessary, when the terms of the bill of lading are so notorious as to constitute a custom of the particular trade.

Insurance by "ship or ships."

§ 70.—Sometimes, especially in insuring consignments from abroad, the ship is not named, the goods being insured "per ship or ships." The usual course in such

stand or not stand, and in either case, apparently, the assured would be entitled to recover 1000*l.*, his actual loss having been greater. There was no pretence for saying that the thing to which the valuation was meant to apply was not wholly lost.

cases is to "declare" the interest, by an endorsement on the policy, as soon as the ship they are to come by is known. Concerning the order in which such declarations follow one another, it may be well here to mention the rule, which is now clearly settled as follows. The declarations made on the policy are always subject to rectification, in case it shall subsequently appear that the advices have come forward, and the declarations have therefore been made, in an order different from that of the actual shipment of the goods. The shipments declare themselves, so to speak, and take rank under the policy in the order in which they occur, so that the declaration written on the policy is merely provisional, and must be set right in case of need (*t*).

Commencement and termination of the Risk.

§ 71.—The points at which the risk, or liability of the underwriters, begins and ends, are in the next place defined by the following clause :—"*Beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship , upon the said ship, &c., and shall so continue and endure during her abode there upon the said ship, &c., and further until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever shall be arrived at , upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same be there discharged and safely landed.*"

This marking out of the termini may appear incomplete; but it must be remembered that, without any clause at all, the termini are to a great extent defined by the very nature of insurable interest. The points at which that interest is constituted, or begins to exist, have been already set

(*t*) *Stephens* v. *Australasian Ins. Co.*, L. R. 8 C. P. 18, at 23.

forth in the preceding chapter; and insurable interest comes of itself to an end, so soon as the risk is over, and the expectation becomes a certainty. Here we have natural limits, which may sometimes cover between them less ground than that allowed by the printed words in the policy. The interest in the cargo, for example, does not begin to exist until the cargo becomes the property of the assured, which may in some cases be a later period than the loading on board the ship (§ 5, *ante*): and the interest, whether in cargo or ship, may be terminated by a sale afloat, made without a transfer of the policy (§ 5). Thus the points at which an insurer's liability begins and ends depend, partly on the nature of the transaction, and partly on the words of the above clause, taken in conjunction with the description of the voyage, as "*at* and from A. to B."

On merchandise: risk in craft.

§ 72.—The goods are not insured until the "loading thereof aboard the ship." If, therefore, the merchant desires to cover the risk in boats or lighters from the shore to the ship, he should insert the clause "to include all risk of craft whilst loading." No similar clause is requisite for the risk whilst discharging, if craft are ordinarily employed for the purpose at that place; this being protected by the words "until discharged and safely landed" (*u*). But whenever there is any likelihood that the goods may be landed in craft at a place where that mode of landing is not in the ordinary course of things,—*e.g.*, in Liverpool, where lightering is not usual, yet occurs occasionally in certain states of the tide for the sake of despatch,—the safer course is to provide for this contingency by a special clause.

Termination of risk in craft.

Concerning the risk in craft, one thing more is to be noticed. The insurance is for the *voyage*, and the voyage, so far as the interests in cargo and in freight are concerned, terminates on the final delivery of the goods by the carrier to the merchant, in such a manner as to entitle

(*u*) *Matthie* v. *Potts*, 3 B. & P. 23.

the former to his freight. This may sometimes take place at a point anterior to the "discharge and landing" of the goods. For instance, if the consignee sends his own lighter, and takes delivery of his goods from alongside (supposing this not to be the usual course in the trade), the voyage is thereupon at an end, and the underwriter discharged from liability (*v*). If, in such a case, the risk in the lighter is to be covered, there must be a special clause to that effect; and further, if there is anything unusual in the transit in such lighter, *e.g.*, if the goods are to be carried in it to a wharf unusually distant from the ordinary discharging place in the port, it will be prudent to make this intention clear on the face of the policy. The printed form of policy, as a rule, covers whatever is customary in the voyage described, but nothing beyond.

Goods laden previously to commencement of risk.

§ 73.—Since the policy is on goods from A. to B., "beginning the adventure from the loading thereof aboard the ship," the policy implies on the face of it that the goods are to be laden at A., or at some one of the ports of departure therein named. Hence, a policy in the ordinary form does not cover goods laden in some previous part of the voyage. It has been decided that a policy on goods "from Gottenburg to the Baltic" does not cover goods laden in London and carried thence to the Baltic *viâ* Gottenburg (*x*); and that a policy "at and from the Coast of Africa" does not cover outward-bound cargo remaining on board the ship at the time of her loss on the African coast (*y*). In such cases, the broker's duty (*z*) is to insert words to express the peculiarity of the risk, such as "wheresoever laden," or, in African voyages, usually, "outward cargo to be considered homeward

(*v*) *Sparrow* v. *Carruthers*, 2 Str. 1236; *Strong* v. *Natally*, 1 B. & P. N. R. 16.

(*x*) *Spitta* v. *Woodman*, 2 Taunt. 416.

(*y*) *Rickman* v. *Carstairs*, 5 B. & Ad. 651.

(*z*) *Ante*, § 46.

interest twenty-four hours after the ship's arrival at her first port of discharge" (*a*).

This is no doubt a severe rule, and the Courts will relax it whenever they can find a reasonable pretext for doing so. Thus, where a *part* of the goods were landed and reladen at the port of departure named in the policy, sufficiently to inspect the remainder (*b*); where the policy was expressed to be "in continuation of" another policy (*c*); and, even, apparently, on no stronger ground than because the ship and cargo had changed hands by a sale at the port of departure named in the policy (*d*); the Courts refused to enforce the rule. Yet the rule is after all founded on common fairness: in insuring goods from the port of A., and likewise from the loading of them on board, the underwriter is in effect told that the goods are to be laden at A.,—and the risk is less on goods so laden than on goods remaining on board from a previous passage, not only because the risk *at* A. is of shorter duration, but on account of the risk, in the latter case, of the goods having been unsuspectedly damaged in some earlier part of the transit.

On goods: continuance of risk.

§ 74.—Between the termini the policy protects the goods during the whole time, not on shipboard merely, but whilst they are in a warehouse at an intermediate port, always supposing they are put there legitimately, as, from some unforeseen necessity, or because a landing and transhipment falls within the regular course of the voyage insured (*e*). This is the effect of the words, "and so shall

(*a*) These words are sufficient to take the case out of the rule in *Rickman* v. *Carstairs*. *Joyce* v. *Realm Ins. Co.*, L. R. 8 Q. B. 580.

(*b*) *Nonnen* v. *Kettlewell*, 16 East, 176.

(*c*) *Bell* v. *Hobson*, 16 East, 240. "If there be anything to indicate," said Lord Ellenborough, "that a prior loading was contemplated by the parties, it will release the case from that strict construction." The indication, however, must be something apparent on the face of the policy. (*Joyce* v. *Realm Ins. Co.*, L. R. 8 Q. B. at 584.)

(*d*) *Carr* v. *Montefiore*, 33 L. J. (Q. B.) 57, 256; 5 B. & S. 408.

(*e*) *Harrison* v. *Ellis*, 7 E. & B. 465; *Pelly* v. *Royal Exch. Ass. Co.*, 1 Burr. 341; *Brough* v. *Whitmore*, 4 T. R. 206. The rule is of course

continue and endure until," &c. There may, however, be exceptional cases in which the voyage consists of two distinct parts with a break between; in which case the goods may not be insured at all during that break (*f*).

On ship: commencement of risk.

§ 75.—With regard to the ship, the blank space left in the policy after the words "upon the said ship, &c.," was no doubt intended to be filled up with the date or period from which the risk was to commence; but this is seldom or never done, nor is it now necessary. The risk insured is "*at* and from" the first port named in the policy, and it has been decided that the risk begins immediately upon the ship's arrival at A. in good safety (*g*). Thus, where a ship, whilst entering the harbour of Havannah, and before she had cast anchor at the place intended, but when she was within the precincts of the harbour, grounded and received damage, it was held that the underwriters on a policy "at and from Havannah"

the same for ship's materials, when landed for a temporary purpose. See Arn. Ins. 391.

(*f*) An example of this is given in the *Australian Agricultural Co.* v. *Saunders*, L. R. 10 C. P. 668. Wool was insured "at and from the river Hunter for ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first water-borne, and of transhipment or landing and reshipment at Sydney." This wool was not carried under through bills of lading, but was sent to Sydney under contracts of affreightment which terminated there. It was then placed in a stevedore's warehouse, for the purpose of being "dumped" or cleaned, and made into smaller bales; and while there was destroyed by fire. Here the Court of Appeal held that the time when the goods were thus in store formed no part of any act of "transhipment or landing and reshipment" (at p. 674). Blackburn, J., said that to make the underwriters liable for the risk of fire while the wool is in a warehouse or store, there must be express words or some custom by which the period while the wool was so warehoused could be considered as part of the voyage (at p. 676). There were in fact in this case two distinct voyages, having no real connection with one another, beyond the being insured in the same policy.

(*g*) She must arrive in the port in a state of sufficient repair or seaworthiness to be enabled to be there in safety. (*Haughton* v. *Empire Mar. Ins. Co.*, L. R. 1 Exch. 206, at p. 210, and see *Parmeter* v. *Cousins*, 2 Camp. 234, and *Bell* v. *Bell*, 2 Camp. 475.) This requisite, however, belongs rather to the head of seaworthiness than to the question of date of commencement.

were liable (*h*). But she must have arrived at the place itself, not merely the "port of the place," *i.e.*, the custom-house district, which may include the place ordinarily known by that name and other places besides,—*e.g.*, if the insurance be at and from Lyme, it is not enough that the ship is within "the port of Lyme," which includes that and other towns (*i*). If, however, the first place named in the policy is an island or district comprehending several ports, as Jamaica, the policy on ship attaches as soon as the ship arrives at the first discharging port within the district (*j*). The distinction evidently is that in the former case the popular and ordinary use of the name refers to the town, and in the latter to the district.

On ship: continuance of risk.

The ship continues protected by the policy so long as she is *at* the port with reference to the voyage *from* it to the next (*k*). This includes all time properly taken in discharging the cargo she brings thither, effecting needful repairs, or otherwise making ready for the voyage (*l*). It likewise covers all delay occasioned by accidental causes during these operations; such as the being frozen in for the winter or the like. It does not, however, include delays not necessary for the ultimate performance of the voyage (*m*); if, for instance, the ship is kept in port in order to be employed as a hulk there.

(*h*) *Haughton* v. *Empire Mar. Ins. Co.*, L. R. 1 Exch. 206.

(*i*) *Constable* v. *Noble*, 2 Taunt. 403.

(*j*) *Camden* v. *Cowley*, 1 W. Black. 417. The policy is in this case determined at this point, from which it may reasonably be inferred that a policy the other way would at this point attach.

(*k*) One apparent exception to this rule, based on a custom of the trade, occurs in the Newfoundland fishery. There it is or was usual for the ships, after arriving off the coast of Newfoundland, to go "a banking," *i.e.*, fishing along the banks, before setting out on their homeward voyage. An insurance on the ship "at and from Newfoundland" to an English port, is understood not to begin to take effect until the vessel returns from her banking. (*Vallance* v. *Dewar*, 1 Camp. 503.)

(*l*) *Phillips* v. *Irving*, 7 M. & G. 328.

(*m*) *Palmer* v. *Fenning*, 9 Bing. 462.

On ship: termination of risk.

§ 76.—The only point, connected with the duration of the risk on ship, which is determined with precision on the face of the policy is a purely arbitrary one—viz., the date when the risk ends,—when she "hath moored at anchor twenty-four hours in good safety."

Mooring.

The mooring must be at the place of final discharge of either the whole or a substantial part of the cargo (*n*). This means the dock, or place equivalent to a dock, but not necessarily the quay-berth. Coming to anchor in the river Thames, with intention of entering a dock when the tide shall serve, is not a final mooring (*o*). But if she enters the dock, or comes to the wharf, where her cargo is to be landed, and is lashed alongside of other vessels waiting her turn for a quay-berth, that brings the policy to an end (*p*). Where a ship was chartered to Wallasey Pool in the river Mersey, or so near thereto as she could safely get, and was insured "to her discharging berth in the United Kingdom;" and the ship, drawing too much water to go up the Pool, discharged a large portion of her cargo in the river, and was then driven ashore and wrecked in a gale, it was held, the jury having found that "a substantial part" of her cargo was discharged in the river, that the policy was off twenty-four hours after she was moored there (*q*). This, however, must be regarded as a somewhat exceptional case.

Mooring in good safety.

And she must be so moored "in good safety." Where a ship arrived so leaky that she was lashed to a hulk to

(*n*) If, from whatever motive, the voyage is given up, or put an end to at some port short of the place of destination named in the policy, the policy comes to an end immediately that resolution is come to. (Arn. Ins. 424.)

(*o*) *Samuel* v. *Royal Exchange Ass. Co.*, 8 B. & Cr. 119. And where a ship which had been for a short period moored to a wharf was within the twenty-four hours ordered off to quarantine, and whilst there, but more than twenty-four hours after the original temporary mooring, was lost by a peril insured against, it was held that the policy had not expired. (*Waples* v. *Eames*, 2 Str. 1243.)

(*p*) *Angerstein* v. *Bell*, 1 Park Ins. 54.

(*q*) *Whitwell* v. *Harrison*, 2 Exch. 127.

prevent her sinking, and actually did sink three days afterwards, the policy was held not to have expired (r). Good safety does not mean that she needs no repairs, but that she must be safe enough for the port and her actual circumstances at the time; so that "she can keep afloat in harbour sufficiently for the purpose of being repaired" (s).

For twenty-four hours.

This state of good safety refers only to the time of mooring, not to the twenty-four hours which follow. This little addition, as well as the fifteen or thirty days to which it is occasionally increased by a special clause, is treated as a time-policy engrafted on a voyage-policy (t). Hence, if the ship is in good safety at the time of mooring, she may cease to be in safety before the twenty-four hours have run out, and yet the policy will lapse at the end of them (u).

With regard to time-policies generally, the precise date of commencement and termination is always named in the policy. It is only necessary to observe that, the policy being a contract entered into between landsmen in England, civil not nautical time, and English time, not the time of the place where the ship may happen to be, is the criterion (x). The day, unless otherwise expressed, begins and ends at midnight.

§ 77.—The Stamp Act directs that no policy shall be effected for a longer period than a twelvemonth (y).

(r) *Shawe* v. *Felton*, 2 East, 109.

(s) *Annen* v. *Woodman*, 3 Taunt. 299; see also *Lidgett* v. *Secretan*, L. R. 5 C. P. 190.

(t) When the words "and 30 days" are added in the policy, these give an extension of 30 days in addition to the 24 hours. (*Mercantile Mar. Ins. Co.* v. *Titherington*, 5 B. & S. 765.)

When the policy is "from A. to B. and for thirty days *while at B.*," it is clear that the ship is only protected while she is in fact *at* B.: therefore, if after arrival at B., B. being an open roadstead, the ship is blown out to sea in a gale, or has to slip her anchor and run out to sea, the underwriter would not be answerable for any damage she may suffer whilst at sea, or until she has returned to B.

(u) *Lidgett* v. *Secretan*, L. R. 5 C. P. 190, at 199.

(x) Arn. Ins. 428.

(y) 30 Vict. c. 23, § 8.

Duration when not expressed. § 78.—With regard to other subjects of insurance besides merchandise and ships, the policy is silent as to the date of commencement and termination; this, therefore, must be determined by the nature of the interest, as already set forth. The rule for all such insurance is, that, unless limited by the description of the voyage in the policy itself, the policy protects such an interest from the time when it is constituted or begins to exist until it has ceased to be exposed to the perils insured against.

Valuation of Interest.

§ 79.—Valuations of merchandise may be made either in the lump or in detail; at so much per bale or package if the quantity is unknown; or on the invoice cost, with a specified percentage added, or at a specified rate of exchange for the foreign money, at a rate that shall cover the expected profit.

The Premium.

Policy contains receipt for premium. Returning now to the printed form of policy, and, as heretofore, taking its clauses in the order in which they occur, we come in the next place to the enumeration of the perils insured against, and then to the "sue and labour clause." The topics involved in these two clauses are reserved for a fuller consideration. Then follows a clause which at the present day may be regarded as of purely antiquarian interest, being a promise by the underwriters that their engagement shall be as binding on them as if it had been made in Lombard Street, or on the Royal Exchange, or anywhere else in London. And this promise they make, "*confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of* ." This receipt given for the premium raises the questions which we are now to consider: and it is the last clause in the policy to be dealt with in

this chapter; since what follows it, "the memorandum," as it is called, is to be discussed later.

§ 80.—The underwriter acknowledges, then, that he has received the premium; as no doubt in old times it was usual to pay the premium in cash at the time of insuring; and this acknowledgment is binding on him, in spite of any proof that may be offered to show that the premium has not in fact been paid. Hence, it follows that an underwriter cannot sue the assured for unpaid premiums, nor can set them off against an action brought by the assured for a loss; and further, that in case the assured shall for any reason be entitled to a return of premium, the underwriter cannot set up as a defence that the premium has not yet been paid (*z*). **Effect of this.**

But the employment of an insurance-broker, and the introduction into insurance business of a system of credit, raise complications. The system which for many years has prevailed at Lloyd's is followed in the main with modifications in the other ports of this country, where insurance is practised on a large scale; and the legal effects of this system have been settled by numerous decisions, the results of which must here briefly be summed up. **How far complicated by employment of broker.**

§ 81.—The usual course, then, is, that the insurance-broker, acting as a sort of financial medium between assured and underwriters, opens a double set of credits. In dealing with the assured, he debits him with all the premiums, holding the policies as his security, collects any losses, credits the assured with the amounts thus recovered on his behalf, and makes periodical settlements of the balance. In dealing with the underwriters, he opens a separate account with each of them, crediting him with the premiums and debiting him with any losses, and making periodical settlements of the balance. By this **System at Lloyd's.**

(*z*) *Dalzell* v. *Mair*, 1 Camp. 532; *De Gaminde* v. *Pigou*, 4 Taunt. 246; *Power* v. *Butcher*, 10 B. & Cr. 329; and see *Xenos* v. *Wickham*, 14 C. B. (N. S.) at 456.

means, as in transactions at the Clearing House, business is carried on with a great economy of capital. This is the general system, though naturally there often are modifications in particular cases (*a*). Sometimes, for example, the assured prefers to pay the premiums in cash, and retain the policies in his own hands.

Effect of this system.

§ 82.—Under this system, the legal relations of the three parties are as follows:—The broker is the agent of the assured, to pay for him the premium, as if in cash, to the underwriter, and likewise, provided the policy remains in the broker's hands, but not otherwise, to receive for him from the underwriter any losses that may be due (*b*). The broker's authority in this latter respect was at one time supposed to be limited to the receiving of these losses in cash, or money; but later decisions have modified this to a certain extent, and it is now the law that, if it can be proved that the assured was cognizant of the customary mode of dealing at Lloyd's, as above described, he must be taken to have assented to it as a term of his bargain, and consequently that in such a case the broker is acting within the scope of his authority, as agent for the assured, in receiving losses, not in cash, but as part of a general settlement in account. This is not so, however, if it cannot be shown that the assured, at the time of entering on the transaction, was cognizant of the Lloyd's custom as to settlements in account; in that case, as the assured, had he retained the policy in his own hands, could have claimed from the underwriter a settlement of the loss in money, he has a right to require that the broker, acting as his agent, should collect the loss in the same way, or treat his principal as if he had done so (*c*).

The broker is agent for the underwriter, to collect for him, as if in cash, all premiums due, and to pay over to

(*a*) For a fuller account of this system, see Arn. Ins. 191–195.

(*b*) *Power* v. *Butcher*, 10 B. & Cr. 329.

(*c*) Arn. Ins. 197–203, and cases there cited.

the assured whatever losses the underwriter has been debited with in the account between him and the broker.

The direct relations between the assured and underwriter have been already defined (§ 80). The underwriter has no direct claim on the assured for premiums, but is directly liable for returns of premium and losses to the holder of the policy, whether assured or broker.

All that now remains is to consider the effect of these legal relations under the various contingencies that may arise.

Failure of assured.

If the assured, whether through insolvency or for any other reason, fails to do his part, that is to say, to pay the premiums due to the broker, the broker in the first place has a lien on all policies in his hands belonging to the assured for his general balance (*d*); and he likewise has a right to sue, or rank on the estate of, the assured, for the balance due to him,—the acknowledgment given by the underwriter not availing as against the broker. It must be taken, in short, that the assured has empowered the broker to pay the premium for him, that the broker has done so, and that the broker now requires repayment from his principal (*e*).

Failure of underwriter.

If the underwriter fails, the loss must fall on the assured (*f*). The broker is simply his agent, bound indeed (see § 44) to use due diligence to obtain none but solvent underwriters, but not, in his mere capacity of broker, guaranteeing their continued solvency. Sometimes, however, such guarantee is given by the broker; but as a distinct contract, for which he is paid by what is called a *del-credere* commission. Thus, the broker, apart from any such special guarantee, is not affected by the

(*d*) *Ollive* v. *Smith*, 5 Taunt. 55. Arn. Ins. 210.

(*e*) *Power* v. *Butcher*, 10 B. & Cr. 329, at 347; *Xenos* v. *Wickham*, 14 C. B. (N.S.) 452.

(*f*) Unless, indeed, the broker has actually paid over a claim to the assured before collecting it from the underwriters; in which case there can be no refund. (*Edgar* v. *Bumstead*, 1 Camp. 411.)

failure of an underwriter, except indirectly, so far as such failure may affect the value of a policy on which he has a *lien*, which, of course, is not material, provided the assured is solvent.

Failure of broker.

Greater complications may arise, in case it is the broker who fails. First, as to the position of the assured:—We are to suppose that the broker owes him money; which can only be, in case the broker has received from the underwriters payments for losses, to an amount exceeding that which the assured owes the broker for premiums. Can the assured, in such a case, claim that the underwriters shall pay those losses a second time, on the plea that the debt was due to *him*, and has not yet been paid to him? This must depend on whether the broker, in receiving those payments from the underwriter, acted within the scope of an authority given him by the assured. If the broker received those payments in money, he at the time holding the policy,—no matter whether he held it under a right of lien, or because it had been handed over to him by the assured for the purpose of collecting the loss,—it is beyond doubt that the broker has acted within the scope of his authority; in which case the underwriter cannot be called on a second time (*g*). If the underwriter has paid the broker without having the policy produced, he has done so at his peril, and may have to be punished for his negligence by being made to pay a second time. If the underwriter has paid the loss, not in money, but in a settlement of account, in the manner already described (§ 81), the question whether he can be called upon a second time must depend on whether the assured has impliedly given to the broker an authority to collect losses from the underwriter in that manner; and this again depends, as has been shown, on whether the assured can be proved to have been cognizant of the customary method of dealing at Lloyd's

(*g*) *Scott* v. *Irving*, 1 B. & Ad. 605.

in this matter (*h*). Thus, the law presents the seeming anomaly of offering a premium for ignorance; seeming, not real; for a man who knows what the custom is, if he does not like it, or choose to run the risk, can always secure himself by stipulating with his broker that losses are to be paid over to himself direct.

The position of the underwriter, if the broker fails owing money to him, is simply that he loses all beyond his dividend; for, as has been said, he has no claim upon the assured for unpaid premiums, nor can he set off, against the payment of a loss, the amount due to him for premiums; for the payment for loss is due to the assured, whilst the premiums are due only from the broker (*i*).

The Stamp.

§ 83.—A policy not duly stamped is not good or available in any court of law. The provisions of the Stamp Act, therefore, must be strictly observed (*k*).

In stamping policies, where several distinct interests are insured together, care must be taken to affix a sufficient stamp, by computing, for each interest separately, the fractional part of a hundred pounds as if it were 100*l.*

(*h*) *Bartlett* v. *Pentland*, 10 B. & C. 760; *Andrew* v. *Robinson*, 3 Camp. 199.

(*i*) Arn. Ins. 192, and see p. 219.

(*k*) 30 & 31 Vict. c. 23, § 9. The Stat. 30 & 31 Vict. c. 23 enacts as follows:—

§ 7. "No contract or agreement for sea insurance (other than such agreement as is referred to in § 52 of the Merchant Shipping Act Amendment Act, 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

"A policy" is defined by § 4 to mean, "any instrument whereby a contract or agreement for any sea insurance is made or entered into."

Since a policy may now be stamped at any time on paying a penalty of 100*l.*, the question may be raised whether a slip or covering note can be so stamped as to become a policy within this section. This may here be left as a question of curiosity.

For example, if three interests of 510*l.* each are insured together in one policy, the proper stamp is not for 1600*l.*, but for 1800*l.* (*l*).

Penalty stamp.

A policy may, however, for the purpose of being given in evidence, be stamped after execution on payment of the penalty of 100*l.* (*m*).

Alterations.

Alterations, of course with the consent of both parties (*n*), may be made in a policy, after subscription, without requiring a new stamp; subject to this proviso, that the alteration must not be such as to create an entirely new contract, upon a different subject-matter from that originally stamped. Thus, a warranty may be expunged, and that even after the breach of it has occurred (*o*); the voyage may be changed by adding alternative ports of destination (*p*); a mistake, perhaps of any kind, may be rectified (*q*) without a new stamp. But where a policy "on ship and outfit" was altered into one "on ship and goods," this, being as to the goods a new contract, was held to require a new stamp (*r*).

(*l*) See 30 & 31 Vict. c. 23, Schedule (B).

(*m*) 39 Vict. c. 6, § 2.

(*n*) As to the effect of alterations made without mutual consent, see Arn. Ins. 265—7: the short result is, that such alterations, if material, vitiate the policy.

(*o*) *Kensington* v. *Inglis*, 8 East, 273, at 291.

(*p*) *Ramstrom* v. *Bell*, 5 M. & S. 267.

(*q*) Arn. Ins. 271, and cases there cited.

(*r*) *Hill* v. *Patten*, 8 East, 373. As to alterations generally, see 30 & 31 Vict. c. 23, § 10.

CHAPTER III.

CAUSES WHICH RENDER A POLICY VOID.

Introduction.

If the preceding chapter be regarded as showing how an insurance ought to be made, the chapter now before us is to form its natural sequel or complement, as showing how an insurance ought *not* to be made; in other words, what faults, mistakes, or omissions will deprive the assured of the benefit of insurance, rendering the policy void.

§ 84.—Speaking generally, if the assured or his agent has not furnished the underwriter, at the time of insuring, with the materials for correctly appraising the risk he is to run, no matter whether this omission has or has not been morally culpable on the part of the former, the policy will be of no effect whatever; becoming void as a contract, either from the very beginning, or from the point at which the risk becomes different from that which the insurer had a right to expect. This principle regulates the law of concealment, misrepresentation, deviation, breach of warranty, and unseaworthiness. These heads, indeed, simply mark out the principal instances of omission to supply the underwriter with materials for correctly estimating the risk he is to run.

Some safeguard of this kind, involving a heavy penalty, is evidently necessary in order that a law of insurance may carry into effect that which was pointed out in our Introduction as the second main purpose of such a law, namely, that insurance may be conducted economically, or without waste. In the interests of trade, the rates of premium

ought to be as low as they can be, so as to be remunerative. A margin, or extra rate, added on in order to cover preventible uncertainty, arising from negligence or want of precision in describing the conditions of the risk, would represent a tax on commerce,—a tax, not levied by government for some useful purpose, but exacted from the general body of mercantile men for the exclusive benefit of those among them who were careless or dishonest. This evil can only be prevented by rules of a certain wholesome severity.

It might be thought, perhaps, that some safeguard less stringent than that of a total forfeiture of the benefit of insurance might be sufficient for the purpose, at least in cases where the assured was innocent of any intention to defraud. One obstacle to lenity, however, lies in the nature of the contract. A penalty, whatever it be, can only be enforced in the comparatively rare instances of a loss or claim on the policy. In cases of safe arrival the offence is not detected. It may happen, therefore, that for want of a due describing of the risk, a merchant may go on for a series of voyages, perhaps for years, paying a lower rate of premium than he ought to have paid; and it is only when a loss occurs, and when it is of course too late to rectify the mischief as to any previous policies, that the error is detected. The penalty thus occasionally inflicted, to be effectual, must be exemplary. The subject of the present chapter is throughout to be regarded, therefore, as a sort of penal legislation, justifiable and indeed necessary in order to maintain the requisite precision in carrying on insurance, and perhaps only when thus regarded reconcileable, at all points, with natural justice.

The simple, universal, and only penalty known to the law of insurance is, that the policy becomes void. Where this penalty is incurred, it matters not whether the loss or damage claimed has been occasioned by, or is in any way connected with, the error or misconduct in question. If the assured has failed in the duties preliminary to the insurance, by

undue concealment or misrepresentation of material facts; or in the duties incident to the exact setting forth of the risk in the policy, as by deviation or breach of warranty; or in the duties unexpressed, but tacitly understood, of having a seaworthy ship and conducting the navigation in a lawful manner; in any of these cases the contract intended either never has existed or has ceased to exist, and as the law will not *make* a contract for him, the party who intended to insure is simply left in the position of having no insurance.

If the penalty is simple and uniform, so likewise, if traced to the bottom, is the offence. The offence is, in every case, a failure to perform the duty universally incumbent on the assured, of supplying the insurer with those materials for correctly appraising the risk he is to run, which, being particular and not general, are within the exclusive knowledge of the assured. This failure must now be considered, first as it has reference to the preliminaries, secondly to the express, and thirdly to the implied, conditions of the contract.

1.—*Concealment.*

§ 85.—For the preliminaries, the rule is briefly this: the assured must not mislead the underwriter as to the risk to be run, either by saying too little, or by saying what is not true. We begin with the first of these.

General principle.

An underwriter has a right to expect, as the condition of his entering into the contract, a full and true disclosure of all the circumstances that affect the risk. So far as matters of general information are concerned, the mere naming of the thing to be insured, the ship, and the voyage, with other particulars contained in the order to insure, are in the great majority of cases all that is needed: since it is the business of the underwriter to appraise such risks, and the law reasonably supposes him to have the knowledge needful for carrying on his business. The assured,

to use the words of Lord Ellenborough, "is not bound to make a laborious disclosure of what is known to all" (*a*). Therefore whatever in the common course of things belongs to the particular voyage or risk proposed, an underwriter may be taken to know already. But if the intending assured knows of some fact, or even of some rumour, which he has reason to believe the underwriter knows nothing about, and which if he did know would naturally induce him either to decline the risk or ask a higher premium, this fact or rumour he is bound to disclose. Insurance in this respect differs from buying and selling. The vendor may not in all cases be bound to disclose to an intending buyer the faults of the article he offers for sale: but then the buyer can ordinarily look at it, and judge for himself. In insuring, since many facts on which the risk depends are within the exclusive knowledge of the assured, the only way by which a bargain fair to both parties can be ensured, is by obliging the assured to put the underwriter on an equal footing as to such knowledge with himself (*b*).

Testing question. This rule is not to be carried beyond the bounds of good sense. It is well known that the ordinary scale of premiums is fixed somewhat roughly, with a disregard of minute differences as to the degree of risk. There are ordinary variations which an underwriter deliberately ignores. A fact or a rumour may affect the risk, yet may affect it so slightly as not to induce an underwriter of ordinary judgment either to decline the risk or ask a higher premium. Such insignificant matters, therefore, may not affect the validity of an insurance; and, while the assured in case of doubt will do well to take the safe side, an underwriter cannot dispute his liability under the plea of concealment, unless he is prepared to show that the matter concealed was such as would have induced an under-

(*a*) *Vallance* v. *Dewar*, 1 Camp. 503.

(*b*) See the judgment of Lord Mansfield in *Carter* v. *Boehm*, 3 Burr. 1905, for a full exposition of the principles which govern the subject of this section.

writer of ordinary judgment to decline the risk on the terms offered.

§ 86.—The following examples may suffice to illustrate these two principles:—The date of the ship's sailing on the voyage insured, as a rule, need not be disclosed to the underwriter: but if the date seriously affects the risk, as showing that she ought already to have arrived, or for some other reason (*c*), the assured is bound to communicate all that he knows about it. It was formerly supposed that this was not necessary unless the ship was at the time of insuring what is called "a missing ship"; but a more precise and reasonable rule has recently been laid down, viz.:—that the true test is whether at the time of insuring the ship has been so long at sea that a reasonable underwriter would consider the risk a "speculative one," that is to say, a risk which he would not take at the ordinary premium (*d*). So if it is known that other ships which sailed after her on the same voyage have arrived before her, this fact need not be disclosed if those ships are faster sailers than she, so that the circumstance is immaterial; otherwise the underwriter must be informed (*e*). Examples.

(*c*) As for instance in changing the risk from a summer to a winter risk. Concerning this it is to be noted that when an order is given to insure for a voyage from a port named, there is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach. If, therefore, at the time of insuring, the assured knows that the ship will not be at the port of loading for some time, and that this circumstance will materially vary the risk, he must disclose it. It matters not whether the delay be voluntary or results from some accident on the outward passage. And it seems that a variation of this kind would vitiate the policy, not simply on the ground of undue concealment, but as the breach of an implied warranty. The practical conclusion is, that whenever a ship or goods are insured homewards, on any voyage as to which the time of year is material to the risk, at a time when the ship is still on her passage out, it would be prudent to communicate this fact to the underwriter. (*De Wolf* v. *Archangel Ins. Co.*, L. R. 9 Q. B. 451.)

(*d*) *Striblcy* v. *Imperial Mar. Ins. Co.*, 1 Q. B. D. 507; to this extent modifying *Elton* v. *Larkins*, 5 C. & P. 385.

(*e*) *Littledale* v. *Dixon*, 1 B. & P. N. R. 151; *Rickards* v. *Murdoch*, 10 B. & Cr. 527.

If the assured has advices of the ship's having been seen in distress, or in circumstances of danger, or of a storm having occurred in a place where the ship was or was likely to be, or of any similar occurrence out of the common course which would enhance the risk, he is bound to lay what he knows before the underwriter (*f*). He is to bear in mind that what is important is not the event,—as whether the ship is lost in that particular storm or not,—but the effect which the intelligence may reasonably have on the mind of the underwriter at the time. For this reason it is immaterial whether the report prove true or false (*g*). Even if he can at once prove it to be false, it has been said, and no doubt rightly, that he is bound to communicate it, so as to give the underwriter the opportunity of determining whether, after the disproof, he attaches any weight to it or not (*h*).

Facts bearing on seaworthiness.

§ 87.—It is unnecessary, in general, to inform the underwriter concerning any particular circumstances of the ship's condition with respect to repairs or equipment, as for instance whether she has been lately coppered, what repairs she has received and how long ago, or other such matters tending to show that the ship is more or less eligible as a risk; although, if any question is put by an intending underwriter on such points, the assured is bound to answer truly (*i*). Nor is it necessary, in insuring for the homeward voyage, to mention damage that has occurred on the outward (*k*). The reason is that the underwriter is not on the risk at all, unless the ship sails seaworthy, and seaworthiness is all he has a right to expect; the more or less she has of fitness for the voyage, above this point, is a variation which he ordinarily takes his chance of. The assured need not communicate information con-

(*f*) *Westbury* v. *Aberdein*, 2 M. & W. 267.

(*g*) *Seaman* v. *Fonereau*, 2 Str. 1183; *Lynch* v. *Dunsford*, 14 East, 494.

(*h*) 2 Duer, Ins. 393.

(*i*) *Haywood* v. *Rogers*, 4 East, 590.

(*k*) *Shoolbred* v. *Nutt*, Park Ins. 493, 8th edit.

cerning her seaworthiness, because he warrants her seaworthy (*l*).

§ 88.—It was at one time supposed that a concealment could be excused, by showing that the matter kept back was such as the underwriter had the means of knowing, and might and ought to have known, it being recorded in Lloyd's List, a paper which underwriters use in their daily business. But a recent decision in the Court of Appeal has laid down a more sensible rule. The assured, we must now take it, cannot shield himself from not communicating what he knows, and what his own attention has of course been specifically directed to, on the plea that the underwriter might have read it in a newspaper. "To hold," said Bramwell, L.J., "that the underwriter is bound to carry in his head all that is contained in Lloyd's List relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and needless burden on the underwriter, while the opposite view puts no difficulty at all in the way of the owner" (*m*). To excuse the concealment, then, it must be proved to the satisfaction of the jury that the matter in question was actually known to the underwriter. **Of facts recorded in Lloyd's List.**

§ 89.—The mode of communication should be sufficiently specific to bring the augmentation of risk fairly before the mind of the underwriter. The use of general terms, such **Communication should be specific.**

(*l*) In time-policies, where there is no warranty of seaworthiness, a fuller disclosure may be requisite. Thus where a time-policy was effected shortly after the receipt of a letter from the captain, stating that the ship had been ashore, was shaken and very leaky, and had been taken in a sinking state to Carthagena for repair, the non-disclosure of this letter was held to vitiate the policy. A doubt was thrown out as to whether it would not have had the same effect even on a voyage-policy. (*Russell* v. *Thornton*, 4 H. & N. 788.) The doctrine laid down in this section must of course not be so applied as to be inconsistent with the general principle, that facts out of the common course, known only to the assured, and materially affecting the risk, must be communicated.

(*m*) *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Exch. 40, at p. 54.

as would veil or soften the danger apprehended, borders on fraud, and is, to say the least, hazardous. If it is known, for instance, that the goods are to be laden at a place particularly dangerous, it would not be enough to inform the underwriter that they are to be laden within a district comprehending this and other safer ports (*n*).

Concealment by agents.

§ 90.—Further, it matters not whether the concealment be the act of the assured, or person really interested in the insurance, or of some agent of his. The principle is, that the underwriter is entitled to assume, as the basis of his contract, that the assured has communicated to him every material fact, not only which he knows, but which he ought to have known. A suppression of the truth by an agent inflicts an injury on the underwriter, by inducing him to enter into a contract which otherwise he would not have engaged in, no less than on the assured, by leading him to believe himself insured when he is not: and when one of two innocent parties must be a loser through the fault of a third, the just rule of law is, that the loss shall fall on him who trusted that third party, and so put it into his power to commit the wrong. Hence, where an agent, the shipper of goods, who ought to have telegraphed to the owner the news of the ship's loss, purposely abstained from doing so, and sent the news by post, in order to give his principal time to insure, the insurance was held void (*o*).

The penalty for concealment.

§ 91.—The penalty for concealment, generally speaking, is, that the policy is wholly void; or, more precisely voidable at the option of the insurer on first discovery of the concealment. The underwriter may, if he pleases, elect to condone the concealment and retain his premium; and he must make his election at once. If, after learning of an undue concealment, he does not forthwith give notice to the assured that he means to treat the policy as void;

Policy is voidable, not void.

(*n*) *Harrower* v. *Hutchinson*, L. R. 4 Q. B. 523; 5 Q. B. 584. And see *Lynch* v. *Hamilton*, 3 Taunt. 37; and 2 Duer, Ins. 398 *et seq.*

(*o*) *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511.

still more, if, having heard of the concealment after initialing the slip, he issues a policy, and thereby leads the assured to believe that he has condoned the offence, and deprives him of the opportunity of effecting a valid insurance elsewhere; he will not be permitted, after a loss, to avail himself of the plea of concealment (*p*). Again, in those exceptional cases in which the concealment does not affect the risk as a whole, but only some portion of it which can be detached from the rest; as, where the captain of a ship improperly concealed from the owner the fact that she had sustained damage on the voyage previously to her being insured; the insurance will not be treated as wholly void, but as containing an implied exemption from liability for the particular damage which ought to have been disclosed. The court, in such a case, makes the reasonable supposition that an underwriter, had the fact in question been disclosed to him, would not have declined the risk or asked a higher premium, but would have introduced a clause exempting him from liability for that particular damage (*q*).

Facts not enhancing risk, yet exciting suspicion.

§ 92.—It has been laid down in a recent decision that not merely facts which make the risk greater, but facts which tend to excite in the underwriters' minds suspicion of fraud, must be disclosed. Thus, where cargo was very greatly overvalued in the policy, to an extent beyond what would cover any profit on the sale that could reasonably be regarded as possible, and when no intelligible reason was given why this was done, the Court held that, though actual fraud was not proved, this excessive over-valuation was a circumstance the nondisclosure of which vitiated the insurance (*r*). It was proved at the trial that such a circumstance, if known, would have disinclined underwriters to take the risk at the ordinary premium; pre-

(*p*) *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Exch. 40, at 55; and on appeal, 197, at 205.

(*q*) *Gladstone* v. *King*, 1 M. & S. 35; and see *Stribley* v. *Imperial Mar. Ins. Co.*, 1 Q. B. D. 507.

(*r*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531.

sumably for no other reason than the suspicion of intended fraud which it would arouse. And an insurance on goods "*per* ship or ships" was held to be vitiated where what was concealed was the fact that the assured had with former similar insurances been in the habit, in writing off the values of other shipments as they arrived, of systematically undervaluing them, with the fraudulent intent that the insurer should run a risk to a greater amount than that on which he was eventually to receive a premium (*s*).

2. *Misrepresentation.*

If the mere *concealment* of a material fact renders a policy void, and this though the concealment be without fraudulent intent, and the doing of a mere agent, the *misrepresentation* of such a fact, so as to make the risk appear less than it actually is, and induce an underwriter to take a risk which he might otherwise decline, evidently deserves a penalty not less severe.

Representation, what is.

A "representation," in the technical language of insurance, is something which is told to the underwriter by the assured or broker as an inducement to him to enter into the contract. If volunteered, it naturally is something tending to make the risk appear less than would otherwise be supposed. If given in answer to an inquiry, it is something tending to disarm a suspicion. One way or other, a representation is a statement of fact or opinion, on the faith of which the underwriter is induced to accept the risk. A representation, however, is verbal only, or at any rate is not written on the policy: otherwise, it changes its character, and becomes a warranty or condition of the contract.

Effect of misrepresentation.

§ 93. From the earliest recorded times, and in other countries, particularly France, no less than amongst ourselves, it has been a principle, and perhaps a peculiarity,

(*s*) *Rivaz* v. *Gerussi*, 6 Q. B. D. 222.

of the law of marine insurance, that a misrepresentation, made previously to entering into the contract, if material, or if made with intent to deceive, renders the contract wholly void. By "material" must be understood, not material in the event, but material at the time when it was made, as tending to induce the underwriter to accept a risk which he might otherwise have declined.

Substantial compliance is enough.

A warranty must be literally complied with; but as for a representation, it is enough, when it has been made in good faith, that it be complied with substantially, *i.e.*, so that the risk be not increased. Where an underwriter was told that the ship he was asked to insure "mounts twelve guns and twenty men," and she did in fact carry less guns and men than were named, but the deficiency was more than made up by her having a number of carronades and boys, so that her fighting capacity was rather more than less than was represented, it was held that, although by the custom of trade carronades were not guns, nor boys men, yet that the representation having been substantially complied with, the policy must hold good (*t*).

Of misrepresentation, fraudulent yet not material.

It has been said that a misrepresentation fraudulently made with intent to deceive shall vitiate a policy, even though it be not material (*u*); a proposition which certainly approves itself to one's sense of justice. It may be doubted, however, whether such a case ever arises in practice; for who would attempt to deceive by stating something not material to the risk? What is intended is, perhaps, merely this, that if a fraudulent design can be proved, the materiality of the misstatement need not be discussed.

Misrepresentation by agent.

A misrepresentation by an agent vitiates a policy no less than if made by the principal (*x*). And it does so, notwithstanding that the eventual loss is something

(*t*) *Pawson* v. *Watson*, Cowp. 785.

(*u*) Arn. Ins., p. 551 of 2nd edit.

(*x*) *Fitzherbert* v. *Mather*, 1 T. R. 12.

wholly unconnected with the fact misrepresented; as if a ship misrepresented to be neutral is lost in a storm (*y*).

When a thing is *believed*, or *expected*. If the assured, or his agent or broker, states merely that he *believes* so and so to be the fact, and it is not so, this is no misrepresentation if he honestly believes it; but it is so if it can be shown that from matters within his knowledge he could not really have believed it (*z*). Perhaps, indeed, one who thus asserts his belief ought to be required to show what grounds he had for so believing (*a*). The rules are the same if he merely says that so and so is *expected*.

3. *Deviation and Change of Voyage.*

Of conditions defined in the policy. § 94.—From these preliminary matters we must turn to the conditions actually set down on the face of the contract. Here a somewhat stricter observance of the conditions is necessary. For a "representation," as we have seen, it is enough that it substantially though not literally correspond with the facts; a variation between them, when there is good faith, will not vitiate the policy if it does not increase the risk. But the written conditions of the policy must be literally and strictly complied with, otherwise the policy will be void, not on the ground that the risk was greater than, but merely that it was different from, that which the underwriter undertook. The contract in fact is limited by, or made conditional upon, the terms laid down in the policy. If those terms be not adhered to, the bargain entered into is at an end; and it is too late, after a loss, to make a fresh one.

For example, if the policy is on linens, and the goods laden are cottons, the underwriter is not liable for a loss of these, though it may be that cottons were as good a risk as linens, and that the underwriter would have taken

(*y*) 1 Marsh. Ins. 453.

(*z*) *Pawson* v. *Watson*, Cowp. 787.

(*a*) See 1 Marsh. Ins. p. 454, n. *a*.

either at the same premium (*b*). If the goods are insured by the ship A., and they are shipped by the ship B., or at any part of the voyage are without necessity transferred to the B., the underwriter is off the risk, though it may be that the B. was as good or a better ship, and the underwriter, if asked, would readily have transferred his risk from one ship to the other. If the voyage is described as from A. to B., and the ship goes to C. instead of B., the policy is at an end, no matter though the voyage from A. to C. be less hazardous than that from A. to B.

But all this has reference only to changes not necessitated by the accidents of navigation. This is so, even with regard to the description of merchandize insured. Thus, where the goods insured were, owing to the wreck of the ship, necessarily sold at a foreign port, and, as the best means of remitting the proceeds to the owner, the proceeds were invested in the purchase of goods of a different kind, which were sent on to their destination, the original underwriter was held liable for the loss of this substituted cargo (*c*). And if, from any necessity arising from sea-peril, such as the disabling of the original ship, the goods are forwarded to their destination in another bottom, the original policy protects them on board the second ship (*d*). And in all cases of departure from the track laid down in the policy, the underwriter is never exempted from liability in case the departure from the track is necessitated, or reasonably justified, by the accidents of navigation (*e*). Here, again, it is immaterial

(*b*) *Hunter* v. *Prinsep*, Marsh. Ins. 323.

(*c*) *Plantamour* v. *Staples*, 1 T. R. 611.

(*d*) *Ibid.*

(*e*) *Delany* v. *Stoddart*, 1 T. R. 22. Going out of the course to assist a vessel in distress is no deviation provided, and so far as, it is done to rescue life; it is otherwise if the motive is merely to save property, and so earn salvage. Hence, while it is no deviation to bear down upon a vessel in distress to ascertain whether life is in danger, yet it would be a deviation to take the vessel in tow to bring her into port, if the lives of her crew could be more easily saved, and at less risk to the salving ship, by taking the crew on board the latter. (*Scaramanga* v.

whether the accident is or is not one of the perils insured against in the particular policy. For instance, if a ship be insured against sea-peril only, and not against war-risks, a departure from the track in order to escape the pursuit of an enemy would not vitiate the policy (*f*).

Of those departures from the conditions of the contract which render a policy void, by far the most important, as the most frequent, is the departure from the prescribed track,—a departure which, when not thus justified by necessity, goes by the technical name of Deviation.

Deviation and change of voyage.

§ 95.—Deviation is to be distinguished from a Change of Voyage. This last takes place, when one or other of the termini, either the loading port or the port of final discharge when the insurance is on goods, is different from that named in the policy. So long as the termini remain the same, though the ship, instead of going direct to the port named in the policy, or instead, if there be several ports named, of visiting them in the order which the policy lays down, goes first to some other port, or varies the order, that is simply a deviation (*g*).

The reason for drawing this distinction is, that a deviation has not the same effect on the liability of the underwriter as a change of voyage. In the latter case, the policy ceases to have any validity immediately upon the

Stamp, 4 C. P. D. 316; 5 C. P. D. 295.) Going into port to repair damages which have rendered the ship unseaworthy, is no deviation; but it would be a deviation to remain there in order to effect repairs not necessary for the completion of the voyage. (*Motteux* v. *London Ass. Co.*, 1 Atkyns, 545.) The necessity for obtaining supplies necessary for the voyage is no excuse for putting into a port, if the supplies were such as ought to have been, but were not, put on board before sailing on her voyage. (*Woolf* v. *Claggett*, 3 Esp. 256.)

(*f*) *Scott* v. *Thompson*, 1 Bos. & Pul. N. R. 181. There is a case at nisi prius decided in the opposite way, but this is pronounced by Arnould to have been wrongly decided, which seems plainly reasonable. (*O'Reilly* v. *Roy. Exch. Co.*, 4 Camp. 246; see Arn. Ins. 461, 2nd edit.)

(*g*) *Woolridge* v. *Boydell*, Doug. 16.

forming of the resolution to make the change. Thus, a policy on a ship at and from Liverpool to New York will protect the ship whilst lying in the Liverpool docks intended to make a voyage to New York: but should her owner change his mind and charter her, or put her on the berth for New Orleans, or even definitely resolve to do so, the policy thereupon ceases to protect the ship, and if she were to take fire the next morning, before a single thing had been done by or to her that would not have been done had there been no change of plan, the loss could not be claimed from the underwriters (*h*). A deviation, on the other hand, only renders the policy void from the point at which the course is actually changed. A ship, insured from Liverpool to New York, may be cleared at the Liverpool custom-house with part of her cargo for Halifax and the remainder for New York, and until she reaches the dividing-point, or point at which she turns off from the track for New York direct, she is protected by her policy (*i*). When the deviation has been made, however, the policy is at an end once for all: it does not revive when the ship returns to her direct track, so as to protect her against a subsequent loss (*k*).

That the voyage shall be treated as the same so long as the termini are the same is a convenient practical rule, serviceable in the great majority of cases. There are, however, occasions to which this rule is not applicable, and we must then fall back on some broader principle. Suppose, for instance, that a ship, laden with a cargo of cotton, is insured from New Orleans to Liverpool; and that after she is fully laden the cargo takes fire, and the fire is put out by filling the hold with water, the effect of which is that the whole cargo is rendered unmerchantable, and is, therefore, sold at New Orleans. Suppose, further, that the captain takes in a second cargo, likewise for Liver-

(*h*) *Ibid.*

(*i*) *Hare* v. *Travis*, 7 B. & Cr. 14.

(*k*) *Elliott* v. *Wilson*, Park, Ins. 623

pool, with which he sails on his voyage. Is this the same voyage as that originally insured, and is the ship covered by the original policy?

In order to answer this question we must examine the principle. The reason why the voyage is usually held to be the same when the termini are the same, evidently must be that the identity of a voyage depends on the principal or main purpose of it, and not on the accessory circumstances. With merchant-ships, the principal purpose of a voyage is, ordinarily, the carrying of a particular cargo to a particular place; whence it may properly be held that identity of cargo and identity of destination are of the essence of identity of voyage (*l*).

If, then, the master, when his original contract of affreightment is put an end to, is absolutely free to take a new cargo for any place as may be offered, it would seem that this must be a new voyage, though the port of destination may happen to be the same. In the case of a vessel belonging to a line of packets, bound to go to a particular port and on a stated day full or empty, it would be otherwise. Here the taking of this particular cargo was a mere incident of the voyage, not its determining cause, and if this cargo is withdrawn and another substituted, and still the ship sails in her due turn, the voyage must, it is conceived, still remain the same.

Examples of deviation.

§ 96.—To come now to Deviation:—In the preceding chapter, when setting forth the proper manner of describing the voyage in the policy, the principal instances or

(*l*) This is pointed out by Emerigon, who cites a passage from Casaregis, to the effect that a change of voyage takes place when the first, principal, destination is not pursued by the master, as for instance when the ship is no longer intended to go, nor does go, with her original cargo to the place designed; whereas on the other hand the voyage is the same, when the captain, always retaining his first purpose and destination, does not altogether follow it in the accessories, changing the track from direct to indirect, or calling at other places on the way, yet still with the constant intention of eventually reaching the place of original destination (2 Emer. Ass. c. xiii., § 14, pp. 92—93).

species of deviation have already been pointed out. These are, going to a port not named in the policy, not clearly justified by any custom, nor falling within the range of any more general terms; visiting ports, where several are named, in an order different from that which the policy has defined; where the insurance is to a district comprising several ports, taking them in an order other than customary, or, if there be no custom, other than their natural order; staying to trade, where the language of the policy implies no such liberty; or calling at places, though within some general liberty given, for purposes which are not within the scope of the voyage. To these may be added, improper delay in not prosecuting the voyage with reasonable despatch (*m*).

Effect of deviation.

§ 97.—When a deviation has been made in any of these ways, unless the departure from the prescribed track can be justified on the ground of unforeseen necessity, the policy comes to an end for all purposes the moment the deviation has been actually committed. The deviation may not really have increased the risk (*n*); no loss may have occurred until the ship is again in the same track, possibly at the same time, as if she had not deviated (*o*); the deviation may not be in any respect the fault or act

(*m*) No delay, however unusual, is to be regarded as improper, if it be necessitated in order to carry out the purposes of the voyage. There can be no doubt, for example, that an insurance on a ship at and from a port would cover the ship during a delay at the port of loading, however long and unusual, if properly undergone in waiting for a remunerative freight for the voyage insured. (*Phillips* v. *Irving*, 7 Man. & Gr. 325.) But it is an implied condition in every voyage policy, that the voyage shall be conducted with reasonable despatch; so that a delay not justified by the necessities of the voyage has the same effect as a deviation. (*Hartley* v. *Buggin*, 3 Doug. 39; *Mount* v. *Larkins*, 8 Bing. 108.) The latter case establishes that an unreasonable delay in the outward voyage may have the effect of vitiating a policy on the homeward voyage which by such delay is thrown into a season different from that which the underwriter was entitled to expect.

(*n*) *Hartley* v. *Buggin*, 3 Doug. 39.

(*o*) *Elliott* v. *Wilson*, 7 Br. P. C. 470.

of the assured or his agent: all these circumstances are immaterial; the conditions of the contract have been broken, and the contract is at an end.

Liability of shipowner. § 98.—Suppose the insurance is on goods, and the deviation has been the fault of the shipowner, the owner of the goods, being thus deprived of his remedy against the underwriter, has a right of action against the shipowner for this consequence of his breach of contract. The shipowner cannot shield himself from liability under the plea that the deviation was not the direct cause of the loss of the goods. He has undertaken to deliver the goods at their destination in the like good order as when shipped, and his exemption from liability for their loss is limited to the accidents of navigation occurring in the voyage defined by the bill of lading or charter-party. If he unlawfully digresses from the stipulated track, he must himself be answerable to the shipper or charterer for the perils to which he exposes the goods in a new course of navigation (*p*). All that a merchant has to do, then, in order to be safe, is to take care that the voyage as described in the policy is precisely the same as that marked out in the contract of affreightment.

4. *Breach of Warranty.*

§ 99.—The same strictness of observance which is required for those conditions of the contract which define the subject-matter insured, the ship, and the voyage, is requisite with regard to those extraordinary conditions, so to speak, which are introduced by *warranties*. Every warranty must be, not like a representation substantially, but literally and exactly complied with, under the like penalty of vitiating the policy.

What makes a warranty. A warranty is a condition written on the face of the policy, whether in the body or in the margin, whether in

(*p*) *Davis* v. *Garrett*, 6 Bing. 716; *Scaramanga* v. *Stamp*, 4 C. P. D. 316; 5 C. P. D. 295.

a line with the other writing or transversely. A representation may be made into a warranty by simply writing it into the policy, and its character is then changed. The word "warranted" is not necessary: often a mere word of description has the force of a warranty, *e.g.*, "the British ship *Anne*" amounts to a warranty that the *Anne* is British. But a memorandum pinned or wafered to a policy, or folded inside it, though shown to the insurers while signing, is no more than a representation (*q*).

Warranty must be literally complied with.

The strictness with which a warranty is enforced can hardly be exaggerated. There are two principles: the warranty must be literally complied with, and if the letter be complied with, nothing more, in the way of reasonable inference or supplement, is required. Thus, a policy on a ship for a voyage home from Africa, warranted "to have sailed from Liverpool with fifty hands," was held void for breach of warranty because she had sailed from Liverpool with only forty-six, though six more had been taken in off Beaumaris, and though she was as safe between Liverpool and Beaumaris with forty-six as with fifty, and it would not have mattered to the underwriters on the *homeward* voyage if she had been less safe, or had been lost, during that period (*r*). On the other side, where a ship was warranted to carry twenty guns, and she had twenty guns, it was decided that the warranty was satisfied, though she had not a crew sufficient to work them (*s*). These two decisions are paradoxical; and it may be doubtful, at any rate with regard to the second of them, whether the courts would uphold them at the present day; but they serve to illustrate the principle.

From what point policy is cancelled by breach of warranty.

§ 100.—A breach of warranty only cancels the policy from the point of time to which the warranty refers. Thus, where a ship was insured from New York to Quebec and thence to England, with a warranty to sail from Quebec on or before the 1st November, and the vessel,

(*q*) Arn. Ins. 510.

(*r*) *De Hahn* v. *Hartley*, 1 T. R. 343.

(*s*) *Hyde* v. *Bruce*, 3 Doug. 213.

through some accident, sailed from New York so late that she could not possibly reach Quebec by that date, and was lost on her way thither after the 1st November, the underwriters were held liable (*t*).

Warranty safe on day named. § 101.—A warranty that the ship is safe, or in port, on a day named, is satisfied if that is true on any part of the day; if she is lost, or has sailed, at a later period of the same day, the underwriters are liable (*u*).

Warranties to sail. § 102.—A warranty in very common use is that the ship shall sail before—or after—a day named. Such a warranty does not imply that the ship must have actually quitted the port or district by the time specified; it is enough if she have "broken ground," or set out on her voyage with everything in readiness for it, and able to quit the port, if not prevented by some accidental cause: if she has done this, so far for instance as to have come out of dock into the river, and is then prevented from quitting the port by stress of weather or any similar impediment, the warranty is satisfied. But the impediment must not be in herself: if, therefore, some of the crew, or stores, or a clearance at the custom-house, be wanting, and though she has broken ground it will be necessary to stop for these, she has not sailed within the terms of the warranty, and the policy is consequently void (*x*).

Warranty to sail *from*. On the other hand a warranty "to depart *from*," or "to sail *from* A." by a given day is not satisfied unless by that day the ship has actually left the precincts of the port named (*y*).

Either warranty is absolute: that is to say, it is no

(*t*) *Baines* v. *Holland*, 10 Exch. 803.

(*u*) *Blackhurst* v. *Cockell*, 3 T. R. 360.

(*x*) *Bond* v. *Nutt*, Cowp. 607; *Graham* v. *Barras*, 5 B. & Ad. 1011. If she quits the port without sufficient ballast for the voyage, intending to take in the remainder outside the bar, that is no "sailing" in this sense, and if the ballast is taken in after the date specified, the warranty has been broken. (*Pettigrew* v. *Pringle*, 3 B. & Ad. 514.)

(*y*) *Moir* v. *Roy. Exch. Ass. Co.*, 4 Camp. 84; *Lang* v. *Anderton*, 3 B. & Cr. 495.

excuse that the ship was ready, and only prevented from leaving by a storm or other accident (*z*).

5. *Implied Warranties: Unseaworthiness.*

We come now to "implied warranties," or conditions of the contract not set down in writing, but tacitly understood as essential, being grounded in the nature of the transaction between the parties. A breach of one of these tacit conditions is no less fatal to the contract, and is fatal to it precisely in the same way, as the breach of an express warranty; it does not merely exempt the underwriter from losses connected in the way of consequence with the breach, it renders the policy wholly void.

Why a warranty is implied.

§ 103.—The principle on which the law annexes tacit conditions of this kind to a contract, thus in a sense doing that which our judges have repeatedly declared themselves incompetent to do, *making* a contract between the parties, is that, where the words used show that there must have been present to the minds of the contracting parties some term or condition *behind* the words, without which the contract would be unintelligible or irrational, a court of law is only carrying out the intention of the parties in supplying that which the very incompleteness of the language used indicates as its necessary complement (*a*).

§ 104.—It is, for example, an implied warranty in every insurance for a voyage, that the ship shall at the outset of it, and more particularly when she puts to sea, be *sea-*

(*z*) *Nelson* v. *Salvador*, Mood. & Malk. 309. A warranty "no St. Lawrence," excludes both the Gulf and the River St. Lawrence. (*Birrell* v. *Dryer*, 9 Ap. Ca. 345.)

(*a*) A warranty or condition may be implied, "whenever there is something not expressed, which it is clear to all men, of ordinary intelligence and knowledge of business, must have been either latently or palpably present to the minds of both parties to the contract when it was made; for otherwise their contract would be as a business transaction insensible or contrary to the universal course." (*Per* Brett, J., in *Daniels* v. *Harris*, L. R. 10 C. P. at 8.)

worthy, or reasonably fit in every respect to encounter the ordinary difficulties of that voyage.

What is seaworthiness.

To render a ship seaworthy, it is not enough that she can by possibility perform her voyage, supposing the weather shall be exceptionally fine: she must be fit to encounter *ordinary* rough weather (*b*). Nor is it enough that she can perform the voyage sooner or later; she must be fit to perform it with reasonable despatch, since delay increases the danger: whence a ship was held unseaworthy because her topgallant and other light sails, needed to enable her to keep up with her convoy, were rotten when she sailed, and unfit for use (*c*). She must also have proper stores and medicines (*d*). Nor is it enough that her hull is sound and her tackling in good condition: there must likewise be a crew sufficient in number, and a master and officers competent for their duties (*e*). A ship was pronounced unseaworthy because her first mate was a landsman ignorant of navigation, so that there was no one on board qualified to take the place of the master in case of need (*f*). And it would seem that the officers must be certificated according to the requirements of the Merchant Shipping Acts. And the ship must not be overloaded (*g*).

(*b*) *Daniels* v. *Harris*, L. R. 10 C. P. 1, at 4.

(*c*) *Knill* v. *Hooper*, 2 H. & N. 277.

(*d*) *Woolf* v. *Claggett*, 3 Esp. 257.

(*e*) *Forshaw* v. *Chabut*, 3 Br. & B. 158. With regard to a pilot, a ship would be unseaworthy if she set sail without a pilot, where the taking of a pilot is customary or compulsory by law; but not so, if at any later stage of the voyage the master, whether prudently or not, omits to take one. There is indeed one decision (*Law* v. *Hollingsworth*, 7 T. R. 160) opposed to this latter position, so far as relates to an improper omission to take a pilot compulsory by Act of Parliament; but this is now generally considered to be doubtful law, as being opposed to the principle that the warranty of seaworthiness applies only to the outset of the voyage. It is at all events certain that a justifiable omission to wait for a pilot in entering a port does not vitiate the policy.

(*f*) *Clifford* v. *Hunter*, 3 C. & P. 16; it is to be noted that this was a voyage from Mauritius to England, and the length of the voyage formed an element in the judgment.

(*g*) *Daniels* v. *Harris*, L. R. 10 C. P. 1.

§ 105.—Seaworthiness is not a fixed inflexible quantity; the degree required has a relation to the length and hazardousness of the voyage, and the kind of cargo. A higher degree of it would be required for a voyage round Cape Horn than for one from London to Liverpool. If the voyage consists of several stages, some of which require a greater degree of seaworthiness than others, the owner generally speaking has the option of either making the ship seaworthy at the outset for the whole course, or, at the commencement of each stage, for that stage only (*h*). Thus in the case of a whaler, the warranty, it has been said, has four gradations: the ship must be "fit for dock in London, fit for river to Gravesend, fit for sea to Shetland, then fit for whaling" (*i*). When the policy is "at and from" a port, no more is required of the ship while she lies in harbour than that she be fit to lie there safe, nor when she begins to load than that she be fit to hold her cargo without damaging it (*k*); but when she sails she must be fit for sea, otherwise the policy at that point ceases to protect her. But with regard to any later stage than her first sailing, it is conceived that if the ship was then seaworthy for the entire voyage, the warranty is completely satisfied. To take the case of the whaler: if when she sails from Gravesend she is fit for whaling, it is conceived that there is no absolute warranty that she shall be so when she sails from Shetland, though there would be, were the equipment for whaling postponed to her arrival there. In other words, the rule as to different degrees of seaworthiness for successive stages of a voyage confers a privilege, not imposes an obligation (*l*).

Is a relative term.

(*h*) *Dixon* v. *Sadler*, 5 Mees. & Wels. 414.

(*i*) *Thompson* v. *Hopper*, 6 E. & B. 177, at 181.

(*k*) *Parmeter* v. *Cousins*, 2 Camp. 235.

(*l*) The privilege itself may be subject to restrictions based on the customary mode of conducting navigation. For example, in the case put, as to whaling voyages, it may well be doubted whether the ship would be justified in stopping at Gravesend in order that she might be rendered fit for sea, it being usual to make such a ship fit for

Warranty applies only to time of putting to sea.

§ 106.—When the ship has once put to sea, seaworthy for the voyage insured, the implied warranty has been completely satisfied (*m*). There is no warranty that the ship shall continue seaworthy, nor even that the master shall do his best to keep her so, or to restore her to that condition, in case he shall have the opportunity. If the policy is for a voyage out and home, there is no warranty of seaworthiness for the voyage home (*n*). If the ship, having been rendered unseaworthy by some accident, puts into a port where she might be repaired, there is no warranty that the master shall make her seaworthy before he sails thence (*o*).

Warranty applies to policies on cargo.

§ 107.—The warranty that the ship is seaworthy applies to every insurance for a voyage, even to insurances on cargo (*p*), notwithstanding that the owner of the cargo can have no power to make the ship seaworthy. The warranty is absolute; so that it is not enough to show that the owner of the ship has done all that was reasonably in his power to ensure her seaworthiness; a latent defect, though it be such as no ordinary vigilance could have detected, is fatal to the policy (*q*). And, as has already been said, a breach of this implied condition makes the policy wholly void, so that it is immaterial whether the

sea before leaving the dock in London. All that is meant by the rule, in such a case, is, that supposing, for example, two anchors were enough for the river voyage, but three were needed for sea, the third anchor might be supplied at Gravesend without any breach of the warranty of seaworthiness. (See *Weir* v. *Aberdein*, 2 B. & Ald. 320.)

(*m*) *Annan* v. *Woodman*, 3 Taunt. 299.

(*n*) *Shore* v. *Bentall*, 7 B. & Cr. at 798.

(*o*) *Schloss* v. *Heriot*, Weekly Reporter, 1864–5, p. 596.

(*p*) *Daniels* v. *Harris*, L. R. 10 C. P. 1, at p. 5. There is, however, no such thing as an implied warranty that the *cargo* itself is seaworthy, or shipped in a condition fit for being carried, *e.g.*, without danger of spontaneous combustion (*Koebel* v. *Saunders*, 17 C. B. N. S. 71); nor that the lighters in which the cargo is discharged are seaworthy. (*Lane* v. *Nixon*, L. R. 1 C. P. 412.)

(*q*) *Lee* v. *Beach*, Park, Ins. 468, 8th edit.

loss claimed was in any way connected with the unseaworthiness, or totally independent of it.

Ship-owner's liability for unseaworthiness under the bill of lading.

§ 108.—There is a difference, which must carefully be attended to, between the liability of a shipowner towards the owner of cargo, under his contract of affreightment, and the rights of an underwriter as against his assured, in this matter of seaworthiness. The former is more extensive than the latter, so that there are cases in which the owner of cargo has a double remedy, and may claim either upon the shipowner or upon his own underwriter. Under the contract of affreightment, the shipowner engages with the owner or shipper of the goods he undertakes to carry (*r*), not merely that the ship shall be seaworthy and her crew competent at the outset of the adventure, but likewise that he or his servants will use all reasonable diligence to keep her so during its continuance, and that the master and crew shall do their duty during the entire term. The ship may set out in a seaworthy state, but if she be damaged in a storm, and afterwards put into port, the shipowner would no doubt be liable to the owner of cargo for any loss occasioned by the ship's being improperly allowed to quit that port in an unseaworthy condition. And if any damage to cargo were occasioned by improper navigation on the part of the master or crew, as by negligently running the ship aground, or faultily coming into collision with another ship, the owner of the cargo might recover damages from the shipowner. But in any of these cases the owner of cargo may elect to proceed against his own underwriter, who would have no defence. The underwriter, however, having paid the loss, becomes entitled to take the place of the assured, and sue the shipowner in his name.

It is now settled that under the contract of affreightment, in addition to the liability of the shipowner, above spoken of, to use reasonable diligence on the part of himself

(*r*) That is, of course, unless there be some special clause in the bill of lading, exempting the shipowner from such liability.

and his servants for the safety of the cargo during the entire continuance of the voyage, there is likewise an absolute warranty on his part of the ship's seaworthiness at the time of sailing on the voyage with the cargo. The point of time to which this warranty is attached is made coincident with the point at which such a warranty attaches in the cargo-policy. Hence, if a ship is chartered to go in ballast from A. to B., and there load a cargo for C., it is not enough that she is seaworthy on sailing from A., or at the time of beginning to load her cargo at B.; the absolute warranty is, that she shall be seaworthy when she sails with her cargo from B. The reason given in the judgment is, that the owner of the cargo must not be placed in the position of losing the protection of his policy by reason of the ship's unseaworthiness, and yet have no remedy against the shipowner. One way or other, it was laid down, the owner of cargo ought always to be safe (*s*).

From these decisions it may reasonably be inferred that if a ship is not seaworthy at this point, and is subsequently lost from some cause unconnected with the unseaworthiness, the shipowner, whose breach of warranty has deprived the owner of the cargo of the protection of insurance, must himself stand in the underwriter's place, and bear the loss.

Proof of unseaworthiness. § 109.—Every ship is to be presumed seaworthy until the contrary be proved: the burden of proof is on the underwriter. If a ship springs a leak and founders shortly after sailing, with no gale or other visible cause,

(*s*) *Steel* v. *State Line S. S. Co.*, 3 Ap. Ca. 72; *Cohn* v. *Davidson*, 2 Q. B. D. 455, at 461. And see *Gibson* v. *Small*, 4 H. L. C. at 421. It is to be borne in mind, however, that the shipowner's liability in such a case, where the loss has not arisen from his personal fault, is limited by Act of Parliament to the amount of 8*l.* per register ton; so that an owner of cargo who wishes to be perfectly safe in this matter might do well to insert in his policy some such clause as "No claim under this policy to be disputed on the ground of unseaworthiness; the insurers reserving, however, all rights against the shipowner."

it is natural to suspect her unseaworthy. Formerly it was held that such a circumstance justified the Court in pronouncing her so, without leaving the matter to the jury, in the absence of further information. It is now settled, however, that such an unexplained leakage, though an *indication* of unseaworthiness, which ought to have much weight with a jury, is only one indication amongst several, and it will be for the jury to say whether, taking account of the ship's behaviour on previous voyages, of the length of time that may have elapsed since the ship was last surveyed in a dry dock, and other circumstances, they consider it reasonably probable that the leakage arose from unseaworthiness, or from some "extraordinary though invisible and unascertained peril of the seas" (*t*).

No warranty of seaworthiness in a time-policy.

§ 110.—There is no warranty of seaworthiness in any time-policy. This rule was originally based on the reason that a time-policy may often have its beginning when the ship is in the middle of a voyage, when it would be impossible for her owner to know whether she was seaworthy or not; but the rule is a general one, and applies even though the ship be in her home port, or on the very point of sailing, when the time-policy takes her up (*u*).

It is not to be inferred from this that an underwriter would be liable in case a ship, insured by a time-policy, were lost by reason of her unseaworthiness merely, without the intervention of a peril insured against. This point, however, will be dealt with in the next chapter, to which it properly belongs.

6. *Illegal Traffic.*

Illegal traffic in general.

§ 111.—Finally, an insurance is void if it is intended to cover a voyage or traffic forbidden by law; always pro-

(*t*) *Anderson* v. *Morice*, L. R. 10 C. P. 58, 610; *Pickup* v. *Thames & Mersey Mar. Ins. Co.*, 3 Q. B. D. 594.

(*u*) *Thompson* v. *Hopper*, 6 E. & B. 172, 937; *Dudgeon* v. *Pembroke*, 2 App. Ca. 284, at 293.

vided the assured is privy or in any sense a party to the illegality. Thus if cargo is carried on a ship's deck in winter contrary to statute, a policy would be void if the assured knew of or were a party to the illegal shipment, but not otherwise (*x*). And an illegal act of the master, in carrying passengers without the certificate which the Passenger Acts enjoin, would vitiate the policy on the ship if, but only if, the shipowner were privy to his so doing (*y*). "Where a contract is to do a thing which cannot be performed without a breach of the law, it is void, whether the parties know the law or not. But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law" (*z*).

Smuggling. Concerning smuggling, our law draws a distinction, the propriety of which has been much questioned. To smuggle, contrary to the English revenue laws, is illegal, and vitiates a policy; but to smuggle in violation of the revenue-laws of other countries does not do so; the maxim having long ago been laid down, and still being acted on, that the English law pays no regard to the revenue-laws of other countries (*a*).

Blockade and contraband of war. With a somewhat similar laxity of international morality, our law permits British subjects, when this country is neutral in time of war betwixt other countries, to run a blockade, or to carry contraband of war for the benefit of either belligerent, without treating the insurance of such traffic as illegal; although of course, as such traffic exposes the ship to the risk of seizure, it is necessary to acquaint the underwriter with the nature of the voyage,

(*x*) *Cunard* v. *Hyde*, 2 E. & E. 1; *Wilson* v. *Rankin*, L. R. 1 Q. B. 162.

(*y*) *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581, at 585.

(*z*) *Waugh* v. *Morris*, L. R. 8 Q. B. 202, at 208.

(*a*) *Lever* v. *Fletcher*, 1 Marsh. Ins. 61, 2nd edit.

otherwise the policy would be void on the ground of concealment (*b*).

When this country is at war, the rule for its subjects is more severe. To traffic with the enemy (*c*), or to insure foreign property against British capture (*d*), are illegal acts, and no insurance can avail to protect them.

(*b*) *Ex parte Chavasse, in re Grazebrook*, 34 L. J. (Bkpcy.) 17. In the United States, on the other hand, at all events so far as running a blockade is concerned, such insurances are illegal. (1 Ducr, 690.)

(*c*) *Potts* v. *Bell*, 8 T. R. 548.

(*d*) *Hagedorn* v. *Bazett*, 2 M. & S. 100.

CHAPTER IV.

THE PERILS INSURED AGAINST.

Principles.

THE law of insurance naturally consists of two principal parts, the subject of the first being the effecting of insurance, and that of the second the recovery of losses. To the first belong such questions as, what to insure, how much, in what manner, with what precautions, and under what conditions. This we have now gone through. The second Part has to do with that indemnity against loss, to provide which is the very purpose of insurance; and this may conveniently be divided under two heads, first as to its quality, and then its quantity,—in other words, first what species of losses the assured is to be indemnified against, and secondly on what principles the amount of his indemnity is to be regulated.

The first thing to be done, then, is to define what those causes of loss, or perils, are, which the insurer takes upon himself, as distinguished from those, if any, which remain with the assured. This is to be gathered from the words of the contract, taken in connection with its known scope and purpose, and applying such principles of English law as bear on the matter. Before turning to the words, it may be well to consider that general scope and purpose to which the words must be subordinated.

Principles. § 112.—The purpose of insurance, as has been pointed out in the Introduction, is, to enable a merchant or a ship-owner to carry on his ventures undisturbed by that element

of uncertainty which is brought in by the dangers of navigation. A second element of uncertainty, that arising from the fluctuation of markets, the merchant or shipowner retains for himself.

The combination of these two uncertainties is affected by a third, namely, that ordinary variation in the length of a voyage which may arise either from accident or without accident, as, from one vessel being a quicker sailer than another, meeting with better winds or fewer calms, or being better or more fortunately navigated. A delay arising from such causes may occasion loss or gain, as a market chances to go down or up. If there be a gain, this must not belong to the underwriter; the underwriter, therefore, cannot be asked to pay for the loss; the chances of a longer or shorter voyage, as affecting the market, must remain with the assured.

Again, it is of the essence of insurance that it shall be, on the side of the underwriter, a fair wager; that is to say, that the underwriter shall have a chance of winning to counterbalance his risk of loss. It follows that the losses he is to pay for must be such as *may*, not such as *must*, happen (*a*). This excludes ordinary wear and tear, or damage necessarily suffered in driving the ship through the water by sail or steam; and this, notwithstanding that the degree of it may vary with the variations of ordinary bad weather, contrary winds, and other incidents common to all voyages. It likewise excludes loss arising from natural wastage, corruption through length of time, heating from the confined atmosphere of the hold, and other causes inevitable under the given conditions. These are matters which a merchant can more or less estimate beforehand, and which must be taken account of, with the market price, in determining his ventures. For the same reason, an underwriter must in no case be liable for losses caused by the fault of the assured himself, since such a liability would destroy the fairness of the wager.

(*a*) *Paterson* v. *Harris*, 1 B. & S. at 353.

An underwriter is to pay, then, for losses arising from violence or accident. Here two questions arise: is he to pay for *all* violence or accident, or only for such as is peculiar to sea-transit: and, is he to be exempt from those losses for which the assured has a remedy against some third party, as for example against the shipowner as carrier? In order to answer these questions, we must look to the words of the policy.

Clause in policy.

§ 113.—The clause in the ordinary policy is as follows:—"Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are *of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea; arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition or quality soever; barratry of the master and mariners; and all other perils, losses, and misfortunes,* that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof" (*b*).

This clause evidently is neither a definition based on a principle, nor a complete enumeration of particular instances. Those who framed it have succeeded in conveying, along with the general impression of their meaning, the dimness with which that meaning was present to their own minds. A few prominent or perhaps representative instances are given, and then general words, "all other perils, &c.," are added, to denote that these are only samples of a larger class. Hence, our courts have naturally

(*b*) This clause is of great and unknown antiquity. It is probably of Lombard origin, and deserves comparison with a Florentine formula given in an Ordinance of the year 1523:—"The said insurers running always the risk upon the said merchandize of every hazard of the sea, fire, jettisons, reprisals, robbery by friend or foe, and every other hazard, peril, fortune, disaster, hindrance, or mishap, though such as could not be imagined or thought of as happening or having happened to the said goods insured; also barratry by the captain, except as to stowage or to the custom-house." (4 Pard. 606.)

concluded, and laid it down as a maxim, that these "all other perils, &c.," only mean such perils as are "of a like nature" to those specified. The examples meant to illustrate may thus serve to narrow the definition; and this indefinitely; for the unspecified perils, though like, are not the same as, those specified, so that there is some likeness and some unlikeness, and nothing to determine how much. That common property which entitles a peril to a place on the list is nowhere defined, except in some respects negatively. Negatively, it may be noted, this list at once furnishes an answer to the two questions raised in § 112. A peril, to be insured against, need not be peculiar to sea-transit; for fire is named, and goods may take fire on land as well as at sea. Nor is an underwriter necessarily exempt from those losses for which the assured has a remedy against a third party, for jettison is named, and jettison is usually replaced by a general contribution. But beyond negative inferences of this kind, the definition in the policy does not go.

The several perils enumerated may be grouped under, perils of the seas, fire, perils of war, pirates and thieves, jettison, arrests and restraints, barratry, and "all other perils."

Perils of the Seas.

§ 114.—"The term 'perils of the seas,'" says Lush, J., "denotes all marine casualties resulting from the *violent* action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel,—casualties which may, and not consequences which must, occur" (*c*).

For "violent," we should perhaps substitute some such word as unusual or accidental; for a calm or a fog may be as dangerous as a storm. Even thus amended, the definition is, perhaps inevitably, somewhat vague.

(*c*) *Merchants Trading Co.* v. *Universal Mar. Ins. Co.*, as given in L. R. 9 Q. B. 596.

Foundering at sea. If a ship has not been heard of for so long a time after sailing that there remains no reasonable hope of her safety, she is presumed to have foundered at sea, and the insurers are liable for the loss (*d*). There is in this country no fixed rule as to when that presumption arises; but, after an interval of time supposed sufficient to cover all reasonable chances of arrival, the ship is posted at Lloyd's as missing, and then all underwriters are expected to pay.

Grounding. Grounding, whether arising from stress of weather, ignorance of the locality, blunder or stupidity, the desire to avoid some approaching vessel or other danger, in short, for any reason out of the ordinary course of things in the voyage, is considered one of the perils of the seas. But when a ship is in the ordinary course put on the ground in a place where she is intended to lie, as, to load cargo alongside a quay, or to dredge up a tidal river, and sustains damage merely from not being fit to take the ground, this is not a peril for which underwriters are liable (*e*).

Collision. Collision also is a peril; and this, whether it be the result of inevitable accident, or of fault on the part of the ship insured (*f*), or of fault on the part of the other ship (*g*). On the principle of *causa proxima*, the underwriter must pay, be the fault whose it may. What he pays, is the damage to the thing he has insured: as for the liability of the owner of the ship in fault to pay for the damage suffered by the other, that is a matter with which his underwriter has, under the body of his policy, nothing at all to do. It is usual, however, to provide for this liability by a distinct contract, called the collision clause, inserted in most if not all policies on ships (see § 212).

Stress of weather. Another head of sea-peril is damage suffered through stress of weather; as by blows of the sea which carry away bulwarks, boats, deck-houses, and the like; by losing

(*d*) *Green* v. *Brown*, 2 Stra. 1199.

(*e*) *Magnus* v. *Buttemer*, 11 C. B. 876.

(*f*) See *per* Willes, J., in *Davidson* v. *Burnand*, L. R. 4 C. P. 117, at 121; citing *Dixon* v. *Sadler*, 5 M. & W. 405.

(*g*) *Smith* v. *Scott*, 4 Taunt. 125.

masts and yards in a gale, springing of a leak through violent straining, shifting of the cargo, or becoming water-logged. The only difficulty in such cases consists in distinguishing between sea-peril and wear and tear; a subject which is reserved for the section of Particular Average on ship.

The Perils of War.

§ 115.—The perils of war as affecting merchant ships and their cargoes are, in the case of belligerents, capture and all damage done in the attempt to capture, and this whether the capture be lawful or not, salvage paid for recapture, the being fired into by a friendly ship in mistake (*h*), and the like; in the case of neutrals, arrest for contraband of war, and the various risks involved in an attempt to run a blockade. It is enough here to say that all these are perils insured against.

Fire.

§ 116.—Fire is covered by the policy, whether it be caused by lightning, carelessness, the explosion of gunpowder or acids, or any cause except the *vice propre* of the thing insured. If goods are shipped in a damp state, or otherwise so as to be unfit for carriage, and thereby, without any external accident,—such as unusual heat of the hold arising from a leak,—burst into a flame, the underwriter on these particular goods is exempt, though if the fire spread to other goods or to the ship, the insurers of the latter would of course be liable.

It has been already pointed out (§ 74) that the risk of fire is covered during the whole of the transit, on shore as well as on shipboard, provided the transit is for one entire or unbroken voyage, as, with insurance on goods, it almost always is.

(*h*) *Cullen* v. *Butler*, 5 M. & S. 461.

Pirates, Rovers, and Thieves.

§ 117.—By "thieves" in this clause is to be understood thieves with violence, or thieves outside the ship's company. Mere pilfering by the crew is not a risk insured against: the shipowner alone is responsible for it (*i*).

Jettisons.

§ 118.—Jettison is the intentional throwing overboard of cargo or of the ship's tackling or effects, as, to lighten the ship in a storm or when leaking. For such losses the underwriter of the goods jettisoned is in the first instance directly liable (*k*): the loss, though by the hands of man, being necessitated or justified by the accidents of navigation. When goods or effects are jettisoned for the common safety, all who have derived benefit, that is to say the owners of the ship and the entire cargo, are bound to join in replacing the loss by the contribution called general average. This is a matter independent of insurance. The underwriter of the article thus sacrificed, having paid his assured the loss, is entitled to stand in his place, and receive his share of the indemnity furnished by the general contribution.

A jettison may be induced by motives other than the common safety; as for instance where, the ship being in imminent danger of capture, the master dropped a bag of specie into the sea, lest it should fall into the hands of the enemy; for which the underwriter was held liable under the head of jettison (*l*).

(*i*) See *Taylor* v. *The Liverpool & Great Western S. Co.*, L. R. 9 Q. B. 546.

(*k*) *Dickenson* v. *Jardine*, L. R. 3 C. P. 639.

(*l*) *Butler* v. *Wildman*, 2 B. & Ald. 398.

Arrests, Restraints, &c.

§ 119.—Concerning this peril, one thing alone needs here to be mentioned, viz., that the clause refers only to acts of state, or acts authorized by the sovereign authority in the country. An unauthorized seizure or detention, as by a mob in a meal riot, does not come within the clause, though the underwriter would be liable for it as a loss by pirates or thieves (*m*).

Barratry of the Master or Mariners.

§ 120.—The term barratry, which originally signifies knavery or trick, has been interpreted by our courts to mean any wilful misconduct, either fraudulent or in violation of the law, which is committed by the captain or crew without the connivance of the shipowner, and which tends to the shipowner's prejudice, either as injuring or exposing to risk of injury his property or the property entrusted to his care, or as exposing it to the risk of forfeiture or seizure for penalties on account of the breach of law. Barratry is a crime, and therefore no mere error of judgment can amount to it (*n*). It need not however be fraudulent, or intended for the private benefit of the master or mariners: any unauthorized breach of the law, exposing the owner to penalties, is barratry, though it were intended for the advantage of the owner (*o*).

Examples of fraudulent barratry are, scuttling the ship, running away with her (*p*), embezzling the cargo and unlawfully selling it and making away with the proceeds, or mischief done to ship or cargo by mutineers (*q*). Examples

(*m*) *Nesbitt* v. *Lushington*, 4 T. R. 783.

(*n*) *Todd* v. *Ritchie*, 1 Stark. 240.

(*o*) See *per* Willes, J., in *Grill* v. *General Screw Collier Co.*, L. R. 3 C. P. at 610.

(*p*) *Falkner* v. *Ritchie*, 2 M. & S. 290.

(*q*) *Elton* v. *Brogden*, 2 Str. 1264; *Toulmin* v. *Anderson*, 1 Taunt. 227.

of barratry through mere illegality are, smuggling (*r*), illegal trading (*s*), breach of port regulations exposing the ship to seizure or penalties (*t*), and the like.

It is not barratry if the owner connives at it; and connivance may be inferred from a want of reasonable vigilance, as where a captain had gone on smuggling for three successive voyages without interference on the part of the owner (*u*). By the owner must here be understood that owner who has the immediate control over the master and crew, that is to say, the power of dismissing them. Thus where a ship is demised to a charterer for a term, the charterer having the power of appointing and dismissing the master, it is the charterer whose connivance is in question (*x*).

A ship-master who is also part owner can commit barratry as against his co-owners and their underwriters, though of course not against the underwriters of his own share (*y*).

Where the barratry consists in the illegality, as in the case of smuggling, or any other offence which may expose the ship to the risk of seizure and confiscation (or of penalties, which may be regarded as ransom), the barratry is only the remote cause of the loss, the proximate cause is the being found out, or the seizure. Barratry, from the nature of the case, does not fall within the rule of *causa proxima*, so far as to make it necessary that the barratrous act should be the proximate cause of loss (*z*). If, however, the policy contain a warranty "against capture and seizure," and the barratry is smuggling, and the loss claimed is a penalty inflicted as the price of releasing a ship after seizure, this is not recoverable,

(*r*) *Havelock* v. *Hancill*, 3 T. R. 277.

(*s*) *Earle* v. *Rowcroft*, 8 East, 126.

(*t*) *Knight* v. *Cambridge*, see 8 East, at 136.

(*u*) *Pipon* v. *Cole*, 1 Camp. 434.

(*x*) See cases cited in Arn. Ins. p. 768.

(*y*) *Jones* v. *Nicholson*, 10 Ex. 28.

(*z*) *Cory* v. *Burr*, 8 Q. B. D. at 314; 9 Q. B. D. at 467.

being a loss by seizure and therefore barred by the warranty (*a*).

All other Perils.

§ 121.—The effect of this clause has already been explained. After a number of particular instances have been given, this clause is added, to show that these are examples merely and not boundaries of the insurer's liability. Every other loss of a like nature, though it be such as was not imagined or thought of or in any way present to the mind of insurer or assured when entering into the contract, is undertaken by the insurer (*b*).

The sensible rule of English law now is that the assured, in claiming on the insurer, is not bound to declare in his pleadings on which particular peril he founds his claim, but may claim generally under "the perils insured against." This sweeps away a number of nice and idle questions, to be found in the older law books, as to whether this or that loss is more properly attributable to this or that peril. It is no longer necessary, therefore, to discuss under what head an underwriter is liable for such losses as, damage done to a ship by being blown off the ways in a dry dock (*c*), damage to tobacco by the fumes of sea-damaged hides (*d*), or the like: it is enough that all such losses, the result of violence, or of some accident out of the common course of things, certainly come within the "perils insured against."

Concerning rats, worms, and swordfishes, a word or two may here be said in conclusion. Damage directly done by rats, as for instance by gnawing holes in the ship's bottom, whereby she was rendered unfit for sea, has been

(*a*) *Cory* v. *Burr*, 8 Q. B. D. 313; 9 Q. B. D. 463.

(*b*) Mere suspicion of sea damage occasioning loss of market, is not a peril insured against. (*Cater* v. *Great Western Ins. Co. of New York*, L. R. 8 C. P. 552.)

(*c*) *Phillips* v. *Barber*, 5 B. & Ald. 161.

(*d*) *Montoya* v. *London Ass. Co.*, 6 Exch. 451.

decided not to be a peril insured against (*e*). If, however, a rat should gnaw through a leaden pipe, and thereby let in water which sinks the ship, the underwriter would no doubt be liable (*f*). If a swordfish drives its snout through a plank, it has never been questioned that the underwriter must pay for it. Worming is an example of the same kind on a smaller scale. Damage done by worms to the planking or timbers of wooden ships can be effectually prevented only by copper or metal sheathing. If, through accident, such as a grounding, the sheathing is anywhere rubbed off, and worms get in through the unprotected part, such damage must be borne by the underwriters: not so, if a ship unprotected by metal sheathing is sent into seas infested by worms (*g*). This, in such a case, would be a loss which must, not which may, ensue.

Loss or damage by explosion (*h*), whether of gunpowder, acids, or chemicals, is clearly recoverable under the policy, as resulting from accident or violence from without. So is damage done to one kind of goods as the effect of sea-damage done to another kind. Thus where by sea-peril copra was heated, and this, conjointly with the effects of a gale, caused derangement of stowage to oil casks, whence there was leakage of oil, the underwriters on the oil were held liable. It would be otherwise, it was said, if the heating of the copra had been spontaneous (*i*).

CONSEQUENCES OF THE PERILS.

To complete this branch of the subject there remains only the question, how to deal with the more or less remote consequences of the perils insured against; that is to say, with losses resulting from the combined action of

(*e*) *Hunter* v. *Potts*, 4 Camp. 203.

(*f*) See *Laveroni* v. *Drury*, 8 Exch. 166.

(*g*) *Rohl* v. *Parr*, 1 Esp. 444.

(*h*) So the bursting of a steamer's boiler; *W. India and Panama Tel. Co.* v. *Home and Colonial Mar. Ins. Co.*, 6 Q. B. D. 51.

(*i*) *Koebel* v. *Saunders*, 17 C. B. (N. S.) 71.

the perils insured against, and of something for which the insurer is not liable.

Two principles here come into play:—1. Where there is no question of personal fault on the part of the assured, the law has regard only to the proximate or immediate cause of the loss; *causa proxima non remota spectatur*. 2. In case of fraud or personal misconduct of the assured himself, all consequences thereof, remote as well as direct, are to be excluded from the claim on the policy; *dolus circuitu non purgatur* (*k*). The first of these maxims has a twofold operation: it may extend, or it may limit, the liability of the assured. I begin with its operation as extending it.

§ 122. It is now a settled rule of law, established by a long series of decisions, that any loss directly caused by a peril insured against is to be paid for by the insurers, notwithstanding that the loss may have been brought about by bad navigation, neglect, or fault of the master or seamen, or, excepting only the fault of the assured himself, any other cause not directly insured against (*l*). Arnould (*m*) sets forth a long list of instances illustrating this rule. Where a ship was destroyed by fire, because a careless mate had lighted a fire in the cabin, and then left the ship without a watchman on board (*n*); where a ship fell over on her side in harbour and was bilged, because the rope provided to secure her was not strong enough to hold her (*o*); where a sloop was drifted on the rocks while the seamen in charge of her had all negligently fallen asleep (*p*); in these, and similar cases, the insurers have been held liable. Where a ship is damaged by collision, though the collision may have occurred in calm, clear weather, through mere want of look-out or the mistake

Losses remotely caused by fault of crew.

(*k*) *Thompson* v. *Hopper*, 6 E. & B. at 948.

(*l*) *Dudgeon* v. *Pembroke*, 2 Ap. Ca. at 297.

(*m*) Ins. 2nd edit. 792.

(*n*) *Busk* v. *Roy. Exch. Ass. Co.*, 2 B. & Ald. 72.

(*o*) *Bishop* v. *Pentland*, 7 B. & Cr. 219.

(*p*) *Walker* v. *Maitland*, 5 B. & Ald. 171.

of a helmsman, the underwriters are unquestionably liable (*q*).

These decisions seem to have insensibly run beyond the principle on which they profess to be based. The "proximate cause" of a loss must at least, one would think, be a *cause; i.e.*, something to which, in some sense, active force may be ascribed, or something unusual or unforeseen, —at any rate, something other than the mere necessary sequence, in the common course of things, of a something else preceding it. But, where a cargo of coffee was damaged by water flowing into the hold through a discharge pipe, in consequence of a cock or valve having been negligently left open by an engineer, so that, as the cargo was being loaded, so soon as enough had been put in to bring the discharge-pipe level with the water, water of course flowed in and damaged the cargo. Here it was argued that there was no active cause for the damage, except the leaving the bilge-cock open; but the Court held this to be immaterial, pointing out that, in the case of a collision resulting from negligence, there is no other active cause of the damage, but the negligence itself. Such losses, if not strictly perils of the seas, must be taken, it was said, as *ejusdem generis* (*r*).

Losses remotely caused by latent defect.

§ 123.—It might naturally be inferred from this that if a ship, insured for time, and therefore not warranted seaworthy, were to be lost through sinking in deep water, in consequence of some latent defect, or defect for which the assured was not personally to blame, the mere sinking would be treated as the proximate cause of loss, and the underwriters be held liable. But the decisions do not go so far as this; indeed, point in the opposite direction, though not conclusively.

(*q*) *Smith* v. *Scott*, 4 Taunt. 125; and see *Davidson* v. *Burnand*, L. R. 4 C. P. at 121.

(*r*) *Davidson* v. *Burnand*, L. R. 4 C. P. 117. "The water got in, not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew." *Per* Brett, J., at p. 122.

In *Fawcus* v. *Sarsfield* (*t*), an arbitrator had found that the ship was unseaworthy and met with no extraordinary peril, but on her voyage sprung a leak, which arose "by and from the bad and defective condition of the vessel, and the exposure of the vessel to the usual and ordinary force and violence of the winds and waves on that voyage." Having sprung a leak, the master resolved to take her into an intermediate port to repair damages, fearing that otherwise she would sink at sea. For the expenses thus incurred in going into the port, a claim was made on the time-policy on ship, on the ground that this expense was incurred to prevent her sinking in deep water. But the insurers were held not to be liable. And this decision was referred to with approval by Blackburn, J., delivering the judgment of the Court of Queen's Bench in *Dudgeon* v. *Pembroke*, who says, referring to the passage from the award above cited, "This seems to be an allegation that the loss was from wear and tear, aggravated by the original bad state of the vessel; and if so, the plea was no doubt good" (*u*).

The ship *Golden Fleece*, insured on a *voyage* policy, from the Mersey to Cardiff and Alexandria, left the Mersey to all appearance seaworthy, took in a full cargo of coals at Cardiff, anchored in Penarth Roads on her way out, and that same night, whilst riding at anchor, suddenly filled with water and foundered, there being neither wind nor sea nor anything to account for her going down. Lush, J., told the jury that in the circumstances proved in this

(*t*) 6 E. & B. 199.

(*u*) L. R. 9 Q. B. at 596. See also *Paterson* v. *Harris*, 1 B. & S. 336, where it was decided that insurers on a telegraph cable were not liable for the *chemical* action of sea water on a portion of the cable exposed through some defect in the outer covering used to protect the wire. "An injury of this nature, not arising from the external violence or mechanical action of the winds or waves, but which was the natural and necessary consequence of the ordinary action of the sea water on the cable, in the state in which it was when immersed in the sea, is not comprehended in the perils insured against." (*Per* Cockburn, C. J., 1 B. & S. at 352.)

[illegible] the ship itself. On this direction the jury found for the defendants. The verdict was entered for the defendants, both on the plea denying unseaworthiness and on that denying that the loss was by perils of the seas; and the Court of Common Pleas refused a rule for a new trial, holding the direction unexceptionable (x). "And we quite agree," said Blackburn, J., speaking for the Queen's Bench, "that the direction was unexceptionable; for if the vessel was so weak as to give way from the mere pressure of the water on her port, without anything more, the proximate cause of the loss was that weakness" (y).

The owners of a line of steamers had bought a steamer which had been lying up for some time, and they had been to great expense in overhauling and fitting her for their employ, sparing no pains or cost. She was insured by a time-policy, the following representation having been given by the broker: "I do not mean to say she is a new vessel. She is an old boat bought by Dudgeon, who has spent a lot of money on her, and she has been thoroughly repaired and virtually rebuilt." Soon after sailing, the ship made more water than could be accounted for by the weather, but went safely from London to Gothenburg; on her return voyage, however, a gale came on, and the leakage increased until the ship, being waterlogged, did not answer her helm, and, partly from this cause and partly from the thickness of the weather and the gale, she

(x) *Merchants Trading Co.* v. *Universal Marine Co.*, not reported, but set forth in *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. at 596.

(y) In *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581, at 597.

went ashore and eventually was broken to pieces on the shore. From the findings of the jury it was to be concluded that, if she had not been unseaworthy, from some latent defect arising with no fault on the part of the shipowner, she would not have gone ashore or been wrecked; but, on the other hand, this mishap would not have happened, despite her unseaworthiness, had it not been for the violence of the gale.

On these facts, the Court of Queen's Bench held that the underwriters were liable. "In all cases," said Blackburn, J., "the law regards the proximate cause of the loss; and it would be difficult to find a better example of what Lord Bacon calls the infinity of the 'causes of causes, and their impulsion one on the other,' than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice! We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who *knowingly* sent her out in that state from recovering indemnity for this loss" (*z*).

(*z*) *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581. The allusion here is to *Thompson* v. *Hopper*, 6 E. & B. 937; see also S. C. on demurrer, 6 E. & B. 172. In the latter case the shipowner was personally in fault, for having knowingly sent his ship into the roadstead in a state of unpreparedness for sea, owing to which she was obliged to anchor in an exposed position, and a gale coming on while she was there, drove her ashore and she became a total wreck. Here, though the

This decision was reversed in the Court of Appeal, on various grounds, which it is unnecessary here to set forth (*a*), as the original judgment was reaffirmed in the House of Lords, and on the same grounds. "A long course of decisions in the courts of this country," said Lord Penzance, "has established that '*causa proxima non remota spectatur*' is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the seas is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it" (*b*).

I have set down these decisions at large, not attempting to sum up the result in any compact formula, because the law on this subject seems to be at present incompletely set forth, or undeveloped, so that it cannot at present be positively affirmed of the mere fact of sinking in deep water either that it is, or that it is not, to be regarded as *per se* a loss by a peril insured against. Where the sinking is occasioned by some act or fault of the crew, we have good authority for saying that it is to be so regarded; where it is occasioned by some latent defect in the ship, the authorities are divided, and rather incline the other way. There is, however, so far as I can find, no trace in the judgments of any recognized distinction between these two reasons for a ship's sinking. Nor is there any obvious reason for drawing a distinction between them; latent defect, in spite of all practicable care in supervision, or misconduct of a seaman, in spite of all

proximate cause was the gale and sea perils, the insurers were held not to be liable.

(*a*) *Dudgeon* v. *Pembroke*, 1 Q. B. D. 96. This judgment, however, is at least theoretically interesting, as exhibiting an attempt on the part of our judges to introduce into our law a speculative refinement which appears to have found considerable favour in the United States. (See Phillips, Ins. §§ 1132, 1137, and 1 Parsons, Ins. 620.) It was suggested that where there are two co-operating causes, regard should be had to that one which is "the predominating efficient cause." But this was promptly and emphatically swept away by the House of Lords.

(*b*) *Dudgeon* v. *Pembroke*, 2 Ap. Ca. 284, at 297.

practicable care in the selection, being alike matters for which the shipowner is technically responsible, but morally blameless, and both alike, therefore, matters which are properly insurable.

Partial loss resulting from defect or fault.

§ 124.—The same principles must be applied to cases of partial loss as where the loss is total. Latent defect, or neglect or fault of a seaman, may have the effect of exposing the ship to damage from the perils of the seas, which she would otherwise have escaped from ; and if so, the insurer is liable, no matter, apparently, which of the two, latent defect or fault of the crew, were the remote occasion (*c*).

The port boiler of a steamboat burst at sea, gutting the middle of the ship and blowing up her decks. The jury found that the bursting of the boiler was due to the negligence of the engineers in not examining the boiler from time to time, and in allowing the thickness of the boiler-plate in some parts to become so reduced, either by scaling or by contact with bilge-water, as to be unable to bear a degree of steam pressure not otherwise improper or extraordinary. When the policy was effected this defective condition of the boiler was unknown to the assured. The defect was not, until several months after the date of the policy, sufficient to prevent the boiler from doing its usual work, though, being progressive, it eventually led to the explosion. On these facts, the underwriters were held to be liable for all the damage done by the bursting of the boiler : the replacing of the boiler itself, which would have been necessary even had it not burst, was not claimed. The grounds for this judgment were stated by the Lord Chancellor (Selborne), with whom Cockburn, C. J., concurred, as follows : "These facts cannot, in my judgment, amount to more than what was assumed by the House of Lords in *Dudgeon* v. *Pembroke* (*d*), viz., that the ship was unseaworthy, and that such unseaworthiness (unknown at the date of the

(*c*) See *per* Brett, L. J., in *The West I. Telegraph Co.* v. *Home & Colonial Ins. Co.*, 6 Q. B. D. at 61.

(*d*) 2 App. Ca. 284.

policy to the assured) was the *causa sine quâ non* of the loss. That was a case on a time-policy like the present, and the House decided that the assured on these assumptions was entitled to recover. That decision binds us. So far as negligence on the part of those who ought to have examined and attended to the state of the boiler may be an element in the present case, the same authority, as well as *Dixon* v. *Sadler* (*e*), shows that it is immaterial" (*f*).

Sea-peril and peril excepted.

§ 125.—When a policy is effected with exclusion of some particular peril,—as, for instance, with the clause "free from all consequences of hostilities,"—this has the effect of placing the excluded peril on precisely the same footing as unseaworthiness without fault of the assured under a time-policy; that is to say, when a loss arises from the conjoint operation of a peril insured against and the peril thus excluded, we are to inquire which of the two was the proximate cause. This appears from the following decision:—

During the American war, the light on Cape Hatteras was extinguished by the Confederate troops for military reasons. Owing to the absence of this light the captain of a ship missed his reckoning, struck on a reef of rocks, and became a wreck. The cargo consisted of 6500 bags of coffee, of which 1020 bags would have been saved if the salvors had not been prevented by the Confederate troops, who themselves only succeeded in saving 170 bags, which they kept for their own use. This coffee was insured "free from all consequences of hostilities." On these facts, the Court of Common Pleas held that the underwriters were liable for the loss of all but 1020 bags. The case was to be dealt with, they said, as if there were two policies, one on the war risk, and the other on the sea risk: and the question here was, which of the two

(*e*) 8 M. & W. 895, affirming S. C. 5 M. & W. 405.

(*f*) *West I. Telegraph Co.* v. *Home and Colonial Ins. Co.*, 6 Q. B. D. 51, at 57.

was the proximate cause of loss. Now as to the 1020 bags, it was the Confederate forces which directly prevented the saving, and so caused the loss, of that portion. But the extinguishing of the light was only the remote cause of the loss of the remainder, the proximate cause being the striking on the reef, which could not be said to follow as a natural or ordinary, still less as a necessary, consequence of the extinguishing of the light (*g*).

Causa *proxima* as *limiting* insurer's liability.

§ 126.—In the cases noticed thus far, the rule of looking only to the proximate cause of loss operates in favour of the assured ; but it may likewise, and very materially, operate against him. For, by the same rule, the insurer is only liable for such losses as are the direct or immediate consequences of the perils insured against.

From this principle, taken in conjunction with another fundamental principle of insurance law, viz., that the indemnity must be confined to the loss or damage of the particular thing insured, it follows, that a great number of incidental or secondary losses, springing out of damage to the thing insured, and falling on the owner of it, are not claimable from the insurer.

For example, when a ship is damaged by sea-peril, the

(*g*) *Ionides* v. *Universal Mar. Ins. Co.*, 14 C. B. (N. S.) 259. Some illustrations given in the judgment, though of course dicta merely, are too valuable to be here omitted. Erle, C. J., put the following imaginary cases :—Suppose a shipmaster, chased by a cruiser, to avoid capture, runs ashore, or runs into a bay where there is neither harbour nor anchorage, and being unable to beat out is driven ashore, the loss or damage by such grounding is a consequence of hostilities, and within the exception : not so, if in the second case supposed she does come out of the bay and pursue her voyage, but is afterwards lost in a storm which she would have escaped had she not been pursued and changed her course. Suppose, again, the ship is going to a port where there are two channels, in one of which a torpedo has been laid by the enemy. If the master, not knowing this, goes into the channel where the torpedo is, and is blown up, this is within the exception ; not so, if knowing of the torpedo, he takes the other channel to avoid it, and by unskilful navigation runs aground there. Willes, J., said that the introduction of the word "consequences" made no difference whatever, and that adding the word "all" could not bring in more remote consequences than if that word were not there.

insurer is liable for the cost of repairing the ship, but not for the shipowner's loss resulting from her being laid up and unable to earn freight whilst being repaired; nor again, supposing that during that period it is necessary to retain the ship's crew or any portion of them, is he liable for the owner's loss in having to pay and feed them whilst the ship is so unemployed (*h*). These losses result not from the damage, but from the delay incidental to the damage; so that the damage suffered by the ship, it may be argued, is only the remote cause of them. So if fruit, meat, or any other article of a like perishable nature were to putrefy by reason of delay springing out of sea-peril, the insurer would not be liable (*i*). Nor is the insurer of a ship liable, in case the assured be made liable to pay damages to the owner of some other ship, on account of a collision occasioned by the fault of his crew (*k*). Nor is the insurer of cargo liable for the loss suffered by his assured, whose goods have been sold or bottomried by the captain, to raise funds, in case of necessity, for the shipowner's debt, springing out of a sea-peril, should it happen that when the time came for repayment, the shipowner were insolvent. The sea-peril which led to the incurring of the expense is here too remote: the proximate cause of loss is the shipowner's insolvency (*l*). This has been carried a step further: where the shipowner is a foreigner, and the law of his country exempts him from liability,—as in the case where the outlay exceeds the sum for which the ship is ultimately sold,—the loss falling on the

(*h*) *De Vaux* v. *Salvador*, 4 Ad. & Ell. 420; and see *Wilson* v. *Bank of Victoria*, L. R. 2 Q. B. at 212.

(*i*) *Taylor* v. *Dunbar*, L. R. 4 C. P. 206. It has been said, however, that an insurer of live stock, though not liable for natural death, would be liable for death by starvation, resulting from an extraordinary delay by sea-peril, which exhausted the supply of fodder. (*Lawrence* v. *Aberdein*, 5 B. & Ald. 107, at 111.)

(*k*) *De Vaux* v. *Salvador*, 4 Ad. & Ell. 420.

(*l*) *Powell* v. *Gudgeon*, 5 M. & S. 431; *Sarquy* v. *Hobson*, 2 B. & C. 7.

owner of cargo by reason of such non-liability is not claimable from his underwriters (*m*). This is only justifiable on the ground that the sea-peril which led to the expense is *causa remota*, and that the proximate cause of loss is the shipowner's exemption from liability.

§ 127. Suppose the subject-matter of insurance is an expectation of gain, of such a nature that its insurability is based on the fact, that the obtaining it is liable to be defeated by nothing unless by the perils insured against,—such, for example, as chartered freight, or profit under a contract,—and suppose further that the perils insured against do not actually destroy this expectation of gain, but only bring it into a position in which it becomes liable to be defeated by the voluntary act of some third party; then, if that third party elects so to act, and thereby the expectation of gain is destroyed, is the insurer liable? This is a question not to be answered with confidence either way. Certainly at first sight it seems that in such a case the perils insured against can only be called the remote cause, and the voluntary act of some third party, the immediate cause of loss; and yet we have here a real risk, which a merchant or shipowner may well desire to insure against, and there seems no substantial reason why he should not be allowed to do so. On this question there have been the following decisions:— Cancelling clauses and the like.

The ship *Spirit of the Dawn* was chartered to go in ballast from Liverpool to Newport, and there load a cargo of rails for San Francisco. Before reaching Newport the ship got on the rocks in Carnarvon Bay. This was on the 4th January, 1872: towards the end of March she was got off the rocks and brought back to Liverpool, where she was in fact, though we must assume not necessarily, sold. The purchaser repaired her, and the repairs were completed about the end of August of the same year. On the 16th of February, the charterers, without the consent of the

(*m*) *Greer* v. *Poole*, 5 Q. B. D. 273.

shipowners, hired another ship to forward the rails (which were wanted for the construction of a railway) to San Francisco. The shipowner, having effected an insurance on "chartered freight," claimed a total loss under this policy. On trial, the findings of the jury, as entered, amounted to this:—1st, there was no constructive total loss of the ship; 2nd, the time necessary for getting the ship off and repairing her so as to be fit to carry cargo was so long as to make it unreasonable for the charterers to supply cargo at the end of that time; and 3rd, such time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers. On these facts, a majority of the Court of Common Pleas, and on appeal a majority of the Court of Appeal, were of opinion that the underwriters were liable for a total loss of freight (*n*).

This case, it is evident, involves two distinct questions: 1st, was the charterer justified, by the delay and uncertainty caused by the accident, in throwing up the charter; 2nd, if he were, can the loss occasioned by his doing so be considered as the direct consequence of the grounding on the rocks? It was strongly argued for the defence that the *causa proxima* of the loss was not the grounding, but the exertion by the charterer of a right which the grounding may have given him: but this was negatived, in the Court below, on the ground, apparently, that the plaintiff's interest was the right under the charter-party to have the rails loaded, and so to earn the freight; and that, as soon as that right was destroyed by sea-damage, there was a total loss of his interest by the perils insured against (*o*). The Court of Appeal seems to have got rid of the difficulty, by holding that the perils of the seas themselves completely frustrated that particular adventure, so that, had the charterers not thrown up the charter, but loaded the rails at the end of August, their

(*n*) *Jackson* v. *Union Ins. Co.*, L. R. 8 C. P. 572; 10 C. P. 125.

(*o*) *Per* Cleasby, B., L. R. 10 C. P. at 127.

doing so would have been "a new adventure, a new agreement;" the loss, therefore, was really caused by the perils, not by the charterer's act (p).

Very nearly the same question arose, in a different form, in *The Inman Steamship Company* v. *Bischoff* (q). The *City of Paris* had been chartered to Government for three months certain, at a rate of so much per month, with the clause that if the ship should become incapable "from any cause whatever, to perform efficiently the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners . . . . to put the said ship out of pay, or to make such abatement out of the hire or freight of the said ship as they shall adjudge fair and reasonable." The Inman Company effected an insurance in the ordinary form, "on freight outstanding," for three months, from February 20th to May 19th, 1879. The underwriters knew that the *City of Paris* was under charter to Government, but did not in fact know the terms of the charter. The *City of Paris* took on board troops, and in the month of February, 1879, sailed for South Africa. On reaching the Cape of Good Hope, on the 21st March, she struck upon a rock, and received such injuries as to render her unseaworthy and unfit to carry troops. She was put out of pay, and upon the 17th April, while still at the Cape, she was discharged from Her Majesty's service by the senior naval officer at the Cape of Good Hope. After some delay her repairs were proceeded with, and she received a certificate of efficiency upon the 14th of May. The plaintiffs alleged that during the time covered by the policy, through the perils insured against, a loss accrued to the plaintiffs of the freight which would have been earned between March 21st and May 19th.

At the trial, Brett, L. J., gave judgment for the plaintiffs. The judgment of the Court of Appeal, reversing it, was given by Bramwell, L. J., who said: "No doubt it [the

(p) *Per* Bramwell, B. (S. C.) at 148.

(q) 6 Q. B. D. 648, and 7 Ap. Ca. 670.

charterparty] not only may, but must be looked at, and, for the purposes of this question, at least, may be read as though set out in the policy. But what then? The question still arises, was the loss of the freight a loss by perils of the seas? We are of opinion it was not . . . . They [those perils] are *causa sine quâ non*, but not *causa causans*, not the proximate cause of the loss. Suppose there had been a clause that the ship might be put out of pay if she stranded, and she had stranded, not been injured, but put out of pay, that would have been a loss in one sense by perils of the seas, no less than this, but clearly not covered by the policy" (*r*).

The case went to the House of Lords, where it was likewise held that the policy was not liable, but on grounds carefully distinguished from those above set forth. Thus, Lord Selborne, L. C., said: "The general principle of *causa proxima non remota spectatur* is intelligible enough, and easy of application in many cases, but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent from the observations of Pollock, C. B., in *Montoya* v. *London Ass. Co.* (*s*); of Erle, C. J., in *Ionides* v. *Universal Mar. Ins. Co.* (*t*);

(*r*) *Inman S. S. Co.* v. *Bischoff*, 6 Q. B. D. at 652.

(*s*) 6 Ex. 458. *Per* Pollock, C. B.: "I think it may be laid down as a general rule that where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters in such case are responsible for the further loss so occasioned" (at p. 458). The same principle is laid down by Erle, C. J., in *Ionides* v. *The Universal Marine Insur. Co.* "The maxim *causa proxima*, &c., is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established." (14 C. B. (N. S.) at 285.)

(*t*) 14 C. B. (N. S.) 286. This refers to the string of examples already set forth (*ante*, p. 123, note (*g*).

and from *Bondrett* v. *Hentigg* (*u*). Nor do I think that the question can entirely depend upon the difference between a condition precedent (without which the right to freight would never accrue), and a condition subsequent, by which it might be defeated. The observations of Bramwell, B., at the conclusion of the judgment in *Jackson* v. *Union Mar. Ins. Co.* (*x*), and what took place during the argument in that case, as stated by Cleasby, B. (*y*), appear to me to be adverse to so narrow a view. If, in the present case, the other terms of the charterparty being the same, a power had been reserved to the charterers, or their agents, to determine the contract and their liability to further freight, on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable" (*z*). His Lordship then proceeds to give reasons, based on the special terms of the government charter, for distinguishing such a case from that of a mulct or penalty, imposed by the Lords of the Admiralty after the full freight had been earned, and having no necessary relation to the freight, and therefore not properly to be considered a loss of freight. "I do not dissemble," he concludes, "that there appears to me to be something of refinement in this distinction" (*a*). Lord Blackburn spoke in the same sense: "The liability of the insurer," he said, "must depend on the terms of the charter, and if under those terms a temporary disablement of the ship would deprive the owner of his freight during the time she was disabled, there was a loss of freight, and the insurer was liable" (*b*). "I must own that I have

(*u*) Holt, N. P. 149.

(*x*) L. R. 10 C. P. 148, *ante*, p. 127.

(*y*) *Ib.* 127, *ante*, p. 126.

(*z*) 7 Ap. Ca. at 675—6.

(*a*) 7 Ap. Ca. at 677.

(*b*) *Ib.* at 678.

always sympathised with Lord Colonsay in *Rankin* v. *Potter* (c), where he says, 'something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes;' which, I think, he did not use as a term of eulogy. I think as he did, that when we get a clear view of the fact, it is best to keep clear of such philosophical mazes. And, as I think, the question here is not, what was the proximate cause of a loss of freight, but whether there was any loss of freight" (d). Then, like Lord Selborne, he finds in a close analysis of the terms of the charter reasons for considering that the mulct imposed by the Admiralty was not properly a loss of freight. "Such a risk," he said, "might very well be insured against, but it would require some special clause" (e).

In the case of *The Mercantile S. S. Co.* v. *Tyser*, a steamer then in London was chartered for a voyage from New York to Odessa, with a clause to the effect that if the vessel had not arrived at New York on or before the 1st of September, the charterers had the option of cancelling the charter. An insurance was made "on chartered freight," at and from London to New York and Odessa. The underwriters were not informed of the cancelling clause. The vessel sailed from London in time, with four or five days to spare, but owing to a breakdown in her machinery on the way out—which was held to be a peril insured against—she reached New York too late, and, the charterer having exercised his option, the freight was lost. It was in this case held by Lord Coleridge, C. J., that the underwriters were not liable; and this on two grounds, first that the proximate cause of loss was not the breakdown of the machinery, but the charterer's electing to exercise his option, and secondly that the existence of the cancel-

(c) L. R. 6 H. L. 160.
(d) 7 Ap. Ca. at 683
(e) *Ib.* at 686.

ling clause ought to have been disclosed at the time of insuring (*f*).

(*f*) 7 Q. B. D. 73. "The break-down of the ship gave the charterers the opportunity which it was at their pleasure to avail themselves of or to decline . . . But if, as I think, they [the perils insured against] only gave occasion to that which was in itself the proximate cause of loss, they will not avail the plaintiffs. Still less, of course, will they avail if the proximate cause of loss was by no means the necessary result of the matters I have mentioned; and here it might or might not, almost with equal probability, have been the interest of the charterers to cancel the charter" (*per* Lord Coleridge, at p. 75).

CHAPTER V.

TOTAL LOSS.

General Principles.

FROM considering what kinds of loss are borne by an underwriter, we pass naturally to the classification of losses in respect of their quantity; *i.e.*, according as they are total or partial. Total losses are to be distinguished carefully from partial or "particular average" losses, not only on account of the difference in the mode of adjustment, but because insurance is frequently made against total loss only, or "free of particular average."

A total loss may from one point of view be defined to be, a loss of such a nature that the insurer is to pay the full insured or insurable value of the thing insured, taking to his own use whatever may be saved. In an average or partial loss, on the other hand, the thing insured always remains the property of the assured, whose claim on the insurer is simply for indemnity against loss or damage suffered in respect to it.

General definition.

§ 128.—A thing may be said to be totally lost, when it has ceased to be, and cannot again be made, that thing which it originally was; of which there is no better test than its being unfit to do the work it was originally intended for. A ship, in this sense, is totally lost, when it no longer exists as a ship, capable of navigation, nor can by possibility be restored to that condition; and this notwithstanding that every particle of its fabric may still

remain, whether in the shape of driftwood on the sea-shore, or as a solid mass which hangs together and retains the form of a ship, yet can never do a ship's work. A cargo of hides is totally lost if by decomposition the hides are spoilt for tanning, notwithstanding that the ship's hold may be filled with as large a quantity of manure.

Again, in matters of business there is such a thing as a financial or pecuniary impossibility, in its way as absolute as any other. It is in this sense impossible for a reasonable man, without ceasing to be such, to spend on a thing more than it will afterwards be worth. "A man may be said to have lost a shilling," says Maule, J., "when he has dropped it into deep water, though it might be possible, by some very expensive contrivance, to recover it" (*a*). Thus we are brought to a second class of total losses, namely, where it is possible to repair a ship or carry a cargo to its destination, but would cost more than the operation would be worth.

Actual and constructive total loss.

The distinction between these two classes of loss is marked by a difference in the name,—the former kind, where to restore the thing insured to its original character or purpose is physically impossible, being called an *actual* total loss,—the latter, where to do so is possible, but not worth the cost, a *constructive* total loss, or total loss in construction of law.

Benefit of salvage.

§ 129.—In every case of total loss, as has been said, the underwriter, who pays to the assured the full value, is entitled to whatever may remain of the thing insured,—to the broken pieces or wreck, to the chance of the ship's being lifted if it be sunk, of its recapture if taken by the enemy, or of its unexpected arrival after being supposed lost at sea, together with any advantages incident to such ownership of the "contingent remainder," as, for example, a right to claim damages against the wrongdoer in a collision. The underwriter, in short, paying the loss, becomes the owner of the thing he has insured, with all the rights

(*a*) *Moss* v. *Smith*, 9 C. B. 94, at 103.

of an owner. An abandonment to him by the assured of all these rights, whether expressly made or not, accompanies as a matter of course the payment of a total loss.

Notice of abandonment.

But in cases of constructive total loss, something more than this is requisite. To repair or reinstate the thing insured to its original condition being physically possible, the underwriter is entitled to such timely notice of the intention of his assured not to make the attempt, as may enable him to watch the proceedings, so that, even should he not elect himself to save or to repair the property on his own account, he may at least make sure that the circumstances justify the assured in not doing so. This notice is called, a notice of abandonment.

We are to consider then, first, what is the state of facts which renders the claim on a policy one for total loss; and secondly, on the occurrence of such a state of facts, what are the rules of law with regard to abandonment, and the notice of abandonment. Each of these topics must be considered as affecting merchandize, ships, and freights, separately.

1. *Total Loss of Cargo.*

A total loss, under a policy on goods or merchandize, takes place when the whole subject-matter of insurance is either destroyed or lost, or changed into something of a different species, or cannot be carried to its destination either at all or without undergoing a change of species by the way, or except at an extraordinary expense exceeding its value.

Must be the whole of some one kind of commodity.

§ 130.—First, it must be the whole; that is to say, the whole of some one species of merchandize, belonging to the same person, insured in the same policy. When we speak of a "total loss of a part," the word "total" really means nothing, for total loss of part is equivalent to a partial loss of the whole, and so no more than "loss of a part." But there may be two "wholes" insured in one

policy, and the underwriters may be liable for the total loss of one of them, though the other be safe.

It is evident that we are here upon ground where our rules must be somewhat arbitrary. In fact, the rule has fluctuated, and there is still some uncertainty about it. What is, for this purpose, a "whole"? A grain of wheat, or an aggregate of grains, out of a larger parcel of wheat in bulk, clearly is not. If the wheat is shipped in bags, is one bag a whole? If I ship twenty balks of timber, is each balk a whole?

So far as the English law is concerned, speculations of this kind have been to a great extent settled or silenced by authority. It has been laid down that the entire destruction of some out of more grain in bulk is not a total loss; therefore is not recoverable under a policy on the grain warranted "free of particular average" (*b*). It has been laid down that where the insurance is on rice in bags, valued at a lump sum, the entire destruction of a number of the bags, less than the whole, is not a total loss (*c*). And, though the point has not been expressly determined, the better opinion seems to be that the result would be the same, had each bag been separately valued in the policy (*d*). On the other hand, where two distinct species of commodity are insured in the same policy, as, for example, nautical instruments and clothes in a policy on captain's effects, warranted free of average, the underwriter would be liable for a total loss of the instruments, though some of the clothes were saved (*e*). What are, for this purpose, distinct species, may be sometimes a difficult question: no doubt, for example, woollens are distinct from cottons, but are bleached shirtings distinct from unbleached?

§ 131.—Not only the destruction, but a change of **Change of species.**

(*b*) *Hills* v. *London Ass. Co.*, 5 M. & W. 569.

(*c*) *Ralli* v. *Janson*, 6 E. & B. 422.

(*d*) See Appendix B.

(*e*) *Duff* v. *Mackenzie*, 3 C. B. N. S. 16; and see *Wilkinson* v. *Hyde*, 3 C. B. N. S. 30.

species, resulting from sea-peril, whereby the thing insured becomes something else,—hides, for example, converted into manure,—operates as a total loss. "It surely cannot be less a total loss," says Lord Ellenborough, "because the commodity subsists in species, if it subsists only in the form of a nuisance" (*f*).

Loss of voyage.

§ 132.—Again, not only the destruction or worthlessness of the thing itself, but the mere impossibility of its reaching its destination, so as to perform the voyage insured, may be enough to constitute a total loss; for what is insured is, not merely the goods, but their performance of the intended voyage. Thus, where hides, insured from Valparaiso to Bordeaux, were necessarily sold at Rio de Janeiro, because by sea-damage they were reduced to such a state that if carried on they must cease to be hides before they could reach Bordeaux, this loss, though they were sold for £273 as hides to be tanned, was held to be total (*g*). And the same decision was come to, where a cargo of coals was sold at a port of refuge, because the coals, having been wet by sea-water, could not be reshipped because of the danger of combustion (*h*). The rule must, it is conceived, be the same, if, though the goods themselves were intact, it became impossible to carry them on, because the original ship was disabled by sea-peril and no other conveyance to be had (*i*).

Excessive cost of forwarding.

§ 133.—Finally, there may be a total loss, notwithstanding that the damaged goods might possibly be carried to their destination, if the extraordinary expense of doing so would exceed the value of the goods themselves. For, in such a case, the carrying of the goods to their destination has become in a mercantile sense impossible, in the way illustrated by Mr. Justice Maule, since a reasonable man

(*f*) *Cologan* v. *London Ass. Co.*, 5 M. & S. 447, at 454.

(*g*) *Roux* v. *Salvador*, 3 Bing. N. C. 266; 1 Bing. N. C. 524.

(*h*) *Saunders* v. *Baring*, 34 L. T. N. S. 419.

(*i*) See *Hunt* v. *Roy. Exch. Ass. Co.*, 5 M. & S. 47, at 56; and see Appendix C.

would rather leave the goods to perish than go to the expense of forwarding them (*k*).

Concerning this case it is to be noted that the learned judges who have decided it appear to have fallen into an arithmetical error. They have laid it down that, to constitute a total loss in such a case, the *extraordinary* expenses of forwarding, *i.e.*, the expenses after deducting the ordinary freight, must exceed the *gross* value of the goods, or their value *without* deducting the ordinary freight. And yet it is as demonstrable as the easiest sum in arithmetic that the effect of thus bringing in the freight twice over is fatal to the principle on which the rule is professedly based, at any rate in case the original ship has been disabled (*l*). In that case the two things to be

(*k*) *Rosetto* v. *Gurney*, 11 C. B. 176; *Farnworth* v. *Hyde*, L. R. 2 C. P. 204. The amount for which the damaged goods may be sold at the port of refuge is not to be taken account of. This is right, because the question is not whether a sale at the port of refuge would be a profitable speculation, but whether the goods, as goods to be carried to their original destination, are wholly lost. The distinction between bringing into this comparison of amounts the proceeds of cargo in such a case, and the proceeds of the hull for breaking up, is, that merchandize sold at a port of refuge is still merchandize, but the broken up materials of a wreck are not a ship. (See also *Reimer* v. *Ringrose*, 6 Exch. 263.)

(*l*) The argument on which the judgment in this respect is based is to be found in L. R. 2 C. P. 220, 225 and 226, and a careful examination of it will show that this oversight, of bringing in the freight twice over, or on both sides of the account, lies at the bottom. There is no total loss by sea-peril, it is argued, unless the whole value of the cargo is exceeded by the expense resulting from sea-peril: now the whole value of the cargo is, its value including, or without deduction of, the freight; and the freight under the original bill of lading is not an expense resulting from sea-peril. The fallacy here is, not perhaps obvious, but undeniable when pointed out. The value of the cargo to the merchant or owner of it is not the gross proceeds, but those proceeds minus the ordinary freight. If on the other hand the question is as to the whole value of the cargo to *some one*, no matter whether the owner of the cargo or of the ship, then to some one the entire cost of forwarding it to another vessel, the original ship having been disabled by the perils insured against, is an expense resulting from those perils. That is to say, in computing the value, the interests of shipowner and cargo-owner are added together, but in estimating the expenses, the interest of the cargo-owner alone is looked at.

compared ought to be, the whole cost of forwarding, and the whole sum for which the goods when forwarded may be sold; and if the former exceed the latter, no reasonable man would go to the expense of forwarding.

These, then, are the conditions of a total loss of merchandize; and nothing short of them will suffice. If any part of any one commodity reaches its destination without undergoing such a change of species as above described, it matters not how small a part, nor how badly damaged, not though it sells for less than the freight on it, or less than the bare charges of selling it; it is no total loss of that commodity. Nor again is it a total loss, if the cargo be sold at a port of refuge without a necessity so absolute as has been here described. No mere convenience or advantage in selling it there, such as its fetching a better price, tne avoiding increased deterioration from a prolonged carriage, or any motive which stops short of necessity, will suffice.

Goods sold unidentified.

By reaching their destination is meant, not necessarily reaching the hands of the intended consignee, but simply reaching the port or place. Supposing they arrive there with the marks effaced, so that the goods of several consignees are undistinguishable, and all have to be sold together by some one person, and the proceeds distributed, this does not constitute a total loss (*m*).

2. *Total Loss of Ship.*

§ 134.—A total loss under a policy on ship takes place when the ship is either destroyed or lost, or reduced to a condition of irreparability,—that is to say, either cannot at all, or cannot but at a cost exceeding its value, be so repaired as to be restored to the character of a ship, or cargo-carrying vessel.

What is meant by irreparability requires a fuller explanation.

(*m*) *Spence* v. *Union Mar. Ins. Co.*, L. R. 3 C. P. 427.

To constitute a total loss, it is not enough that the ship cannot be so repaired as to be made as good a ship as she was before, or fit for the same trade. If my ship, which I built and intended to carry fine goods, can be so repaired as to be a serviceable carrier of timber, though she may be of no use to me who am not in the timber trade, it cannot be said that she is totally lost as a ship, for in that capacity she is of value to some one (*n*). **What is irreparability.**

It is an actual total loss, if the ship cannot be repaired at all; which may be, either because she is broken to pieces, or because there are no appliances for repair within reach. This latter case arises, when the ship can only be repaired in a dry dock, and is too leaky to be moved to any place where a dry dock is to be had, and there is no way of temporarily stopping the leak. Here, and in similar cases, it is not a question of cost: to repair so as to restore the character of a sea-going ship is impossible (*o*).

It is a constructive total loss, if the ship can be repaired, so as to be made navigable as a ship, but only at an expense which a prudent owner, if uninsured, would not incur, because it would exceed the value of the ship when repaired. Here we come at once on two questions: in order to make this comparison, what is to be taken as the cost of repairing, and what as the value of the ship when repaired?

§ 135.—The cost of repairing, it is evident, must for this purpose be the minimum, or cost of repairing in the **The cost of repairing.**

(*n*) "The question is whether the damage sustained may be so far repaired as to keep it *a ship, though not perhaps so good a ship as it was before*" (*per* Blackburn, J., in *Rankin* v. *Potter*, L. R. 6 H. L., at p. 117). And see *Gardner* v. *Salvador*, 1 M. & R. 116. "A ship must be so repaired as to be seaworthy to carry cargo" (*per* Cockburn, C.J., in *Potter* v. *Rankin*. L. R. 5 C. P. 341, at 367). Thus there is a distinction, which seems to have crept in insensibly, between a voyage policy on ship and one on cargo, in this respect, that under the former a loss of the voyage is not treated as constituting a total loss of the thing insured, while under the latter it is. (See *Fitzgerald* v. *Pole*, 4 Brown's Parl. Ca. 439; *Doyle* v. *Dallas*, 1 M. & R. 48; *Parsons* v. *Scott*, 2 Taunt. 363.)

(*o*) See *per* Willes, J., in *Barker* v. *Janson*, L. R. 3 C. P. 303, at 305.

cheapest way practicable under the circumstances. If it would be more expensive to repair on the spot than to send the ship to some other place for the purpose, then the amount to be taken as the standard of comparison must be, the cost of repairing at the latter place, adding the expense of removal and of any temporary repair requisite for removing her.

In considering what repairs are to be taken into account, the determining question, what would a prudent owner do if uninsured, is never to be lost sight of. It may be asked, for example, whether the cost of replacing decayed timber, or other defects for which the insurer is not answerable, should be brought in. The answer must be that, if a ship which in spite of these defects was seaworthy has by a peril insured against been rendered unseaworthy, then the only questions are, how much will it cost to make her seaworthy again, and how much will she then be worth. If she cannot be made seaworthy again without removing the decayed timber, then the expense of doing so forms a part of the repair to be taken account of; but in that case on the other side must be placed, the value of a ship from which the decayed timber has been removed (*p*).

Ought the old materials to be brought in?

Ought account to be taken of the sum for which the old materials of the ship, if she be not repaired, may be sold? It is an item which an uninsured owner certainly would take account of. To spend £5,000 in repairing a ship which would then be worth £5,200 would not be a prudent act, if the wreck would have fetched £500 for breaking up. It would seem, therefore, that this item should come in. Care must be taken, however, only to bring in the value of the wreck for breaking up, or for purposes other than navigation; or else what is really a partial might be converted into a total loss. It might for example be more profitable to sell a ship in her damaged

(*p*) *Phillips* v. *Nairne*, 4 C. B. 343; and see Phillips Ins. No. 1547.

state and let the purchaser repair her, than for the original owner to repair; but it would be unreasonable to say that in such a case the ship is totally lost; while on the other hand a ship is none the less totally lost, though the materials be of some value if broken up for firewood or similar purposes (*q*).

§ 136.—We are in the next place to consider the other term in the comparison, namely, the value of the ship when repaired. **The value of the ship**

Concerning this, the first thing to be noted is that the valuation in the policy is not the test for the present purpose. It has been argued, not without force, that as the question of constructive total loss is a question between assured and insurer only, and as they two have agreed together on a valuation of the ship, it should not be open to the assured with one breath or for one purpose to say that the ship is worth so much, and for another that she is worth something more or less. But this reasoning has been overruled by the authority of the House of Lords (*r*), and it must now be taken as settled law that, although the underwriter must pay the loss, if it is total, on the basis of the agreed valuation (*s*), yet for the purpose of determining whether the loss is total or not this valuation should be left out of sight, and no other value considered but the ship's actual worth to her owner. **is not value in policy.**

What, then, is a ship's worth to her owner? If we are to take that sum which a prudent uninsured owner would really bring into his consideration and set against the cost of repairing, we must take the ship's value to him at **Test of value to owner.**

(*q*) See *Young* v. *Turing*, 2 Scott, N. R. 752, at 764. The propriety of the decision on this point has been much questioned: some still hold that the old materials ought not to be taken account of.

(*r*) *Irving* v. *Manning*, 1 Ho. Lds. Ca. 287.

(*s*) The policy-value is to be paid, whatever may have been the condition of the ship at the time of the loss; *e.g.*, no deduction is to be made in respect of stores previously consumed, or damage suffered on some previous voyage and not then repaired. (*Barker* v. *Janson*, L. R. 3 C. P. 303; *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.)

that particular time and place, and having regard to all the circumstances. It must be her value to keep as well as to sell; for though a ship can never be worth less than she would sell for, she may, in the case of a ship having special merits only known to or appreciated by the owner, special adaptation to his particular trade, even in some cases special flag-privileges, be worth very much more. The place where she is may affect her value; a ship being of course worth more when she is at her loading port or freight-market than when she is at a place from whence she must make a trip in ballast in order to fetch or seek a cargo. And, even more conspicuously, a ship's value may be affected by her contracts: one which is on the point of earning a large freight being more valuable than if she were in quest of a fresh engagement. The judgment a prudent owner would form as to the propriety of repairing would vary with all these variations.

In order, then, to determine what value of the ship should be measured against the cost of repairing, we clearly must in many cases look further than to the market price in the home port. For practical purposes, the market price may generally be taken as the minimum or starting-point; then we are to enquire whether there is any peculiarity about the ship herself which renders her more valuable to her present owner than she would be to a chance buyer in the market, and if so to make a suitable addition to the price: then enquire how near the ship is to her freight-market, or that port at which her profitable employment is to begin; and lastly consider whether her existing engagements do not give her an additional value for the time, from the circumstance that the loss of the ship would carry with it a loss of her earnings on the voyage.

This last augmentation of value may be defined somewhat more closely. The market value of a ship is usually based on the supposition that the ship is deliverable to the purchaser forthwith. The purchaser therefore counts on

having her ready for profitable employment, if he can find any at once. A ship which is chartered for a voyage not yet terminated may no doubt be worth more than one which is in this sense free, since she has the chartered freight secure; but if this freight be excluded, she is worth less, and this in proportion as the unexpired duration of the voyage is greater. Hence the augmentation of a ship's value by reason of her having a freight engaged never can extend to the full amount of the freight. If she is near the end of her voyage, it may come very close to it; not so if she is only beginning. At the outset of a voyage, a ship that is chartered may even be less valuable (including her chartered freight) than one that is free; for the rates of freight may have risen in the meantime (*t*).

All these circumstances must be taken into account in determining the value of a ship for the purpose in question, if we are really to carry out the principle that a loss is only total in case a prudent owner uninsured would not repair.

It might perhaps be thought that as the question before us is merely whether the *ship* is totally lost, and as the ship is insured separately from the freight, the value of the ship alone, excluding the freight, should be taken account of. This however cannot be; for the conduct of a prudent owner can only be determined by taking account of both. It might with equal justice be said that when we came to the question, what is a total loss under a

(*t*) At the outset of a voyage, the fact of being chartered only enhances a ship's value if the freight-market has gone down since the charter was made, and then only to the extent of the drop.

Cleasby, B., speaking of the right obtained by a shipowner through having a charter to carry cargo on a voyage not yet commenced, says: "It is a right which may be of considerable or of little value. If, for instance, the chartered freight is high in relation to the current rate at the port of lading, and the charterer is a solvent person, then the right is of considerable value; but if the current rate is higher than the chartered freight, or the charterer has become bankrupt or insolvent, it is of no value" (in *Potter* v. *Rankin*, L. R. 5 C. P. 341 at 355).

policy on freight, the cost of repairing should be measured against the amount of freight, excluding the ship. This very case indeed has been brought before the courts: but Wilde, C. J., said, "We are asked, would any man in his senses spend £1,000 upon the repairs of a ship for the mere purpose of earning £500 freight? To this I answer, certainly not: but this is not the true question: if, by expending £1,000 upon the repairs, he gets not only £500 freight but also a ship worth £3,000, who will for a moment question the prudence of the outlay?" (*u*). This reasoning, it is evident, reversing the figures, applies just as much to the ship as the freight (*x*).

3. *Total Loss of Freight.*

§ 137.—A total loss of freight may take place, either 1st, because the cargo is rendered incapable of being carried; 2nd, because the ship is disabled from carrying it; or 3rd, because the cargo cannot be carried without such delay as justifiably leads to the throwing up of the contract.

Freight, it must throughout be borne in mind, is only insurable because and so far as it has an existence separable from the ship, as having been defined and rendered certain by a contract. What is insured, then, is the freight to accrue to the assured under a contract subsisting at the inception of the risk; and the question, it seems to follow, must always be, not whether some, but whether this, freight is totally lost (*y*).

1. Loss by disabling of cargo.

§ 138.—First, then, as to loss of freight by reason of loss or damage of the cargo:—

The contract, whether bill of lading or charter-party, is,

(*u*) *Moss* v. *Smith*, 9 C. B. 94, at 108.

(*x*) See, in confirmation of this, a dictum by Martin, B., in *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 145.

(*y*) As to the freight, so called, earned by carrying the shipowner's own goods, or prepaid freight, which is insurable on similar grounds, these interests follow the rules applicable to cargo, not to freight, in respect of the liability to total loss.

speaking generally, an undertaking to carry a specific cargo, or one shipload, and that only. As to the bill of lading, the goods to be carried are usually specified on the face of it. And a charter to carry a full cargo means no more than to carry one shipload. Thus where a fire broke out on board a chartered ship, after a portion of her coal cargo had been shipped, and by the water poured in the coal was so damaged as to be unfit for reshipment, the charterer was held not to be entitled to replace this by fresh coal, but only to supply, under the terms of the charter, so much as had not been shipped at the date of the fire (*z*). Since, then, under the ordinary contract of affreightment, the disabling of the one cargo contracted for necessarily carries as a consequence the loss of the specific freight insured, it seems natural to conclude that, if this disability for carriage extends to the entire cargo, there must be a total loss under the policy.

Cargo is disabled from being carried, when it is destroyed, when it cannot be carried with safety to the ship, or without undergoing a change of nature, as by putrefaction, that will make it worthless, and likewise when the carrying of it has become impracticable from considerations of expense; as for instance in those cases of constructive total loss of cargo considered in section 133, where cargo cannot be dried or made fit for reshipment but at an expense exceeding its own value and the freight on it. In these cases, there is a pecuniary impossibility of earning the freight, which must have the same effect on the freight-policy as on the policy on cargo.

Case where part freight prepaid.

§ 139.—To make it a total loss, the disability must extend to the entire freight covered by the policy. This does not in all cases render it necessary that the entire cargo shall be disabled. For, under some charters, the freight insurable by the shipowner, as being at his risk, is a balance only, and such a balance as may be completely swept away by the destruction or otherwise disabling for

(*z*) *Adamson* v. *Gill*, 16 Weekly Reporter, 639.

carriage of a portion only of the cargo. Where for example a lump sum, or a sum computed on the quantity shipped, is prepaid, and is to be deducted from a freight the amount of which depends on the quantity delivered, a diminution of the latter quantity may have the effect of totally extinguishing the balance otherwise due at the end of the voyage. When that is the case, it is settled, on the authority of the House of Lords, that the underwriter on freight is liable for a total loss (*a*).

§ 140.—Suppose, however, that a total loss of the freight on the original cargo has arisen in any of these ways, the question still remains whether, in case the insurance be simply on freight for a voyage named (*b*), and, the loss of freight having taken place early in the voyage, a second cargo is shipped under a fresh contract but for the same voyage, this circumstance can in any way affect the liability of the freight-underwriter. In such a case, can it be said, either that there is no total loss of the freight on the voyage insured, or that, granting there is a constructive total loss, the second freight earned must be treated as a salvage to the underwriter, or deduction from the amount of his liability ?

Here we seem to come upon a conflict between strict right, or the carrying out of the letter of the contract, and what may be termed an equitable interpretation of the principle of indemnity. Strictly speaking, it is certain that the thing insured is the freight under the original contract, and the thing insured is none the less totally lost, because some other thing, it may be of as great or greater value, is obtained by the assured and would not have been obtainable but for the loss, and so in a sense may be said to be substituted for the thing lost. On the other hand, it seems somewhat unreasonable that while the underwriter pays a total loss of freight, the shipowner shall

(*a*) *Allison* v. *Bristol Mar. Ins. Co.*, L. R. 1 Ap. Ca. 209.

(*b*) If the policy were "on chartered freight," no arguable question, it is conceived, could arise on the point.

receive what is virtually a second freight on the same voyage.

The point has not, I believe, been expressly determined in the Courts, though there are dicta of the judges to the effect that, if by the disabling of the cargo there arises a claim for total loss of freight, the assured is bound to abandon to his underwriter any freight that may be thereafter earned on the same voyage (*c*). This raises the question, what is the same voyage,—a question which has been already discussed in this volume (*d*). It is the purpose of the voyage, at least as much as the termini, which constitutes its identity. Where the purpose of the voyage is simply to carry a particular cargo, or to perform such or such a contract of affreightment, that purpose is at an end so soon as the cargo in question is wholly incapacitated for carriage, or the freight-contract absolutely at an end: and the fact that a second cargo is taken to the same place does not of itself make the voyage the same voyage as that originally intended. There may, however, be cases in which the identity of voyage continues after and notwithstanding a total disabling of the original cargo, as for example where a ship belongs to a line of packets, sailing on stated days, and bound to sail irrespectively of any cargoes they may carry; in which case a vessel sailing on the day intended, though not with her original cargo, would certainly be on the voyage originally intended. In an exceptional case of this kind it may be that the second freight would form a salvage for the benefit of the original underwriters; but not so, it is conceived, if, the original cargo having been wholly disabled, the ship is free to go anywhere, and goes by mere accident to the same port for which she was destined originally.

(*c*) See, for example, *per* Brett, J., in *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 99; *Barclay* v. *Stirling*, 5 M. & S. 6; *Everth* v. *Smith*, 2 M. & S. 278.

(*d*) See § 95.

2. Loss by disability of ship.

§ **141.**—Secondly, as to the total loss of freight which may result from the disabling of the ship:—

Here, as in the case of disability of the cargo, no other distinction is to be made between absolute impossibility, resulting from the wreck or irreparability of the ship, and a pecuniary impossibility resulting from the great costliness of repairing, except that the former is an actual, and the latter only a constructive total loss. Whenever such irreparability carries with it a loss of the entire freight at risk which forms the subject of insurance, this is a total loss of freight.

The English law, unlike that of many other countries, recognizes no such thing as a distance freight, or freight *pro ratâ itineris peracti*, given by way of compensation for a partial performance of the contract to carry in cases where the completion of it is prevented by an accident of navigation. The cargo must be carried all the way, or no freight is due. The shipowner may, however, if his own ship be disabled, earn the stipulated freight by sending on the cargo in another bottom.

It follows, that an accident which disables the ship as a carrier, produces a total loss of the freight if the cargo cannot be sent on in another bottom at an expense less than the freight under the original contract.

Suppose that it can be so carried, in another bottom, at a profit, can it with any propriety be said that we have here a total loss of freight? There are dicta of the judges from which it appears to have been thought so; since we are told, but only as a remark by the way (*e*), that when a total loss of freight is claimed by reason of the disabling of the ship, there ought to be an abandonment to the insurer of any possible profit or salvage that may ensue upon transhipment. Perhaps indeed these observations only refer to a state of things in which what is known is only that the ship is disabled, and the possibility of

(*e*) See, for example, *per* Brett, J., in *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 102, 103.

earning freight by transhipment is as yet uncertain. If they go beyond this, they must be met by the preliminary question whether it can be correct to say that the freight is totally lost, when it can be wholly earned by the expenditure of a smaller sum,—an expenditure which a prudent uninsured owner would certainly make. The loss is no more total here than in the case of a ship which, by a peril insured against, has been rendered innavigable, but which can be restored to a sound and seaworthy condition by an expenditure less than its value. On this question there is, so far as I am aware, only one case that touches it, and that is not decisive. In *Kidston* v. *The Empire Marine Ins. Co.* (*f*) it was decided that the expense of such a transhipment is recoverable under a policy warranted "free of particular average." This decision went upon the ground that the expense in question was not a loss of any part of the thing insured, but was recoverable under the "sue and labour clause," or, in other words, was recoverable as an expense incurred to prevent a total loss. This is a very different thing from saying that the loss was total. There was a state of things which would have resulted in a total loss had the expense in question not been incurred, and had the assured not been in some sense bound, as towards his underwriters, to incur it (*g*). On the whole, the better opinion seems to be, that if the whole freight can be earned by the expenditure of a smaller sum in hiring another ship, there has been neither a partial nor yet a total loss of the freight insured. If a portion of the freight can be so earned,—as, for example, if there is available no ship that can carry the entire cargo, but a smaller vessel that can carry a part, then there is of course a partial loss of freight, in respect of the portion of cargo left behind. In any case, if any portion of the freight contracted for and insured is or properly can be actually earned, whether in the original ship or

(*f*) L. R. 1 C. P. 535; 2 C. P. 357.

(*g*) *Post*, § 199, n. (*h*).

one substituted on behalf of the owner of it, there is, it is conceived, no total loss of freight.

3. Loss by delay through accident.

§ 142.—A third possible cause of a total loss of freight is an accident which gives rise to such delay as to justify the throwing up of the contract. This is a comparatively modern doctrine, it being formerly supposed that an underwriter could under no circumstances be liable for a loss directly resulting from delay or loss of time. But it seems to be now settled law that if, after a ship is chartered, but before the cargo is laden, some accident to the ship, such as her running ashore, and thereby needing repair that will occupy a great length of time, occasions a long and unreasonable delay, the charterer may be justified in refusing to wait and supply a cargo at the end of the time; and that, if he does so refuse, the underwriter on chartered freight is liable for a total loss. The facts, in the case where this rule was laid down, were certainly strong. The ship, on her way to the loading port, was driven ashore, and it was for some time doubtful whether she could be got off, and when she was floated she needed repairs which were to occupy four months. The questions put to the jury were, whether the delay was so long as to make it unreasonable for the charterer to supply the cargo at the end of the time, and whether it was such as to put an end in a commercial sense to the speculation entered upon by the shipowner and charterer; both which questions they answered in the affirmative. On this finding, the Court, first in the Common Pleas Division, and then in Appeal, pronounced the underwriter to be liable (*h*).

This decision opens up some important questions. We may assume that the charterer's liberty to throw up the contract on the ground of delay is restricted to the case of delay previous to the shipment of the cargo: since all the older authorities lay it down that if the ship needs repair during the voyage, through accident and not from fault, the merchant is bound to wait. The principle of the

(*h*) *Jackson* v. *Union Mar. Ins. Co.*, L. R. 8 C. P. 572; 10 C. P. 125.

decision, viz., that in such a case neither the act of the charterer in throwing up the contract, nor the delay, but the accident which occasioned the latter and thereby justified the former, is to be taken as the proximate cause of loss, is certainly defensible on theoretical grounds, but, as has already been pointed out, is not altogether consistent with what has been laid down in other cases (*i*). In both Courts, there was a division of opinion amongst the judges. Any attempt, therefore, to deduce conclusions for analogous cases from the rule in *Jackson* v. *The Union* must be regarded as extremely hazardous.

There is one case, however, in which the temptation to do so is strong, and that is, where there is a charter with a "cancelling clause." This clause, which provides that if the ship does not reach her loading port by a day named, the charterer shall be at liberty to cancel the charter, is generally used in trades which depend on a particular season, so that the insertion of the clause is really a sort of announcement that an arrival after the day named will frustrate the objects of the charter, and so "put an end in a commercial sense to the speculation entered upon by the shipowner and charterer." This being so, supposing that a ship which sets sail for the loading port in that which apart from accident would be abundance of time is detained by same peril until after the time designated, and loses the charter in consequence, it might well be argued, by analogy with the decision in *Jackson* v. *The Union*, that the underwriter on freight, supposing the policy to cover the voyage on which the accident occurs, should be liable for a total loss. If in such a case the jury were to find, as they probably would, that the delay necessarily resulting from sea-peril put an end in a commercial sense to the adventure, the only distinction between the case here supposed and *Jackson* v. *The Union* would be that the underwriter might here perhaps plead that the cancelling clause was something which ought not to affect

(*i*) §§ 122—127.

him, as he was ignorant of its existence when he signed the policy. This however would probably be of no avail, since one who insures chartered freight has notice of a charterparty, and might have learnt its terms if he had inquired (*k*); besides which, in certain trades, the existence of a cancelling clause in charters is ordinary, and matter of notoriety; and further, it might be said, it is not the cancelling clause as such, but the frustration in a commercial sense of the purposes of the voyage—of which the cancelling clause is simply the definition,—that occasions the loss of freight (*l*).

II.—Abandonment.

In what cases Notice of Abandonment must be given.

§ 143.—When a total loss, whether actual or constructive, has taken place, the insurer is to pay the sum insured or insurable, as defined in the First Chapter, and is, on the other hand, entitled to whatever may be recovered, the assured abandoning to him all his property in the thing insured, or what may remain of it, or what may accrue as an incident of ownership. Such abandonment is implied as accompanying every settlement of a claim for total loss. It is unnecessary to stipulate for it; it passes without a word spoken; for it is a necessary incident of every contract not only of insurance but of indemnity. This abandonment takes place at the time of the settlement of the claim; it need not take place before (*m*).

(*k*) See *Allison* v. *Bristol Mar. Ins. Co.*, 1 Ap. Ca. 209.

(*l*) This was written before the decision in *The Mercantile S. S. Co.* v. *Tyser*, 7 Q. B. D. 73, *ante*, p. 130, which certainly points in the opposite direction. It is to be noted, however, that in that case the considerations here put forward do not appear to have been before the Court; and I therefore leave the argument as it stands, for the consideration of the reader. It is possible that in that case the facts did not justify the contention that the delay frustrated the objects of the charter.

(*m*) *Per* Brett, L.J., in *Kalten*

This cession or abandonment which accompanies a settlement gives to the insurers a right to all the advantages direct and indirect of ownership of the thing insured. Not only may they take possession of, sell, or otherwise dispose of, the wreck or remains; but if the assured is entitled, in virtue of the ownership he had before, to any rights of action or recovery from third parties, as for a contribution to general average (*n*), recovery of damages against the wrongdoer in a collision suit, or the like, these rights pass by the abandonment to the underwriter. This is so, even should the result be that the underwriter is on the whole a gainer by the transaction; as, if the actual value of a ship recaptured, or unexpectedly arriving when paid for as lost, or the sum recovered as its value from a wrongdoer, or the proceeds of goods necessarily sold at an intermediate port, happen to be more than the value in the policy which the insurer has paid (*o*). The transfer of ownership made by an abandonment of this kind is complete and irrevocable, when once the loss has been settled (*p*).

§ 144.—The *notice* of abandonment is a totally different thing (*q*). The requiring of this notice in certain cases seems to be a peculiarity of the law of insurance. "I am not aware," says Brett, L.J., "that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance, where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused (*r*).

Notice of abandonment.

bach v. *Mackenzie*, 3 C. P. D. 467, at 471; and see *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 106.

(*n*) *Dickinson* v. *Jardine*, L. R. 3 C. P. 639, at 643.

(*o*) *North of England Iron S. S. Co.* v. *Armstrong*, L. R. 5 Q. B. 244; *Burnand* v. *Rodocanachi*, 5 C. P. D. 424.

(*p*) For a fuller discussion of this subject, see Chap. 8.

(*q*) See *per* Blackburn, J. in *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 118.

(*r*) *Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467, at 471.

Of the origin and motives which have led, from very early times, to the requiring a notice of abandonment, various and not always consistent explanations have been given. I will lay before the reader one of the latest, from the judgment of Cotton, L.J., in the case just referred to. "A constructive total loss," says the learned judge, "is when the damage is of such a character that the assured is entitled, if he thinks fit, to treat it as a total loss. When . . . . the assured elects to treat the loss as a total loss, he is bound to transfer to the underwriters the subject-matter insured. The general rule is, that he must, as soon as he has the information which enables him to make his election, give notice to the underwriters that he has so elected. That rule is founded upon two grounds: when the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice, which is entirely different from abandonment, is, that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with, as the ship was in this case. Therefore, the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to" (*s*).

Notice of abandonment, then, is only requisite in cases of constructive, as distinguished from actual, total loss. This again is more precisely defined by saying that notice is only requisite in cases in which the assured is "*entitled* to treat the loss as total," or has a right of election whether to do so or not. A right of election here supposes two conditions: the facts must be such as would induce a

(*s*) *Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467, at 479.

prudent owner if uninsured to treat the loss as total,—this gives the right affirmatively so to treat it; and there must be some property, or some chance at least of property, still remaining in existence,—this gives negatively the right to refuse so to treat it; for no man is bound to abandon his property to his insurer (*t*),—he may always, if he pleases, retain his property, and claim for partial loss only. Wherever these two conditions are found, the right of election here spoken of, and the consequent obligation to give notice of abandonment, must, it is conceived, exist.

This right of electing, whether to treat a loss as total or not so to treat it, can never be anything more than the sort of right a man has to act wantonly or capriciously, without regard to his true interest. A prudent uninsured owner, *as such,* can have no right of election; for one course or other, to repair or abandon, must always be the more to his advantage, and that course is prudentially necessary, and the very basis of the law concerning constructive total loss is that it is financially impossible, or impossible for a man without ceasing to be prudent, to adopt the other course. When this is clearly understood, it seems hardly possible to lay down any rule of distinction between that which is violently or ridiculously, and that which is moderately imprudent; so as to say for example that if the repair will cost 1050*l.*, and the ship, on her utmost valuation, will then be worth 1000*l.*, notice of abandonment must be given, because perhaps the owner might elect to repair; while, on the other hand, if goods insured for 1000*l.* have been necessarily sold at an intermediate port for 50*l.*, notice of abandonment is not requisite, because no man in his senses would elect to keep 50*l.* rather than claim 1000*l.* from his underwriter. It seems, at all events, the safer doctrine that in both cases,—that is, wherever there is in existence anything to abandon, and anything as to which a fool or a madman might exercise an option, a notice of

(*t*) *Lohre* v. *Aitchison*, 2 Q. B. D. 501, at 507.

abandonment, or something equivalent to it, ought to be given (*u*).

Such, after some fluctuation, appears to be at present the rule of English law. A notice of abandonment need not be given where there is nothing to abandon: there is nothing to abandon if at no point of time the assured has had an option or opportunity of making an election between two possible courses: this election, however, is not necessarily an election between two courses equally advantageous, or the advantages of which are somewhat evenly balanced, but may be an election as to which no one in his senses would hesitate. And, where an election in this sense is possible, notice of abandonment

(*u*) Dicta, no doubt, and those of the greatest weight, might be cited against this. It has been urged in the strongest language that a notice of abandonment cannot be requisite where the giving of it would be an idle formality. Thus, in *Rankin* v. *Potter*, Lord Chelmsford rests his judgment on two grounds of principle; first, that in the case before him there was nothing in existence, no property, and no right springing out of property, which could be abandoned to the underwriter; and secondly, at least by implication, that "notice is only necessary to be given where upon receiving it the underwriters could do something in the exercise of their rights over the salvage." This last, he says, "seems to place the rule as to abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters where it is wholly out of their power to take any steps to improve or alter their position." (L. R. 6 H. L. 83, at 157.) And the other Lords who took part in the judgment said what amounted to the same thing. Lord Colonsay put it in the form of a question: "What was to be gained, then, by the notice of abandonment being given?" (p. 161). And Lord Hatherley, commenting on the argument of counsel, to the effect that notice of abandonment ought to be given irrespectively of any advantage which the insurers might possibly derive from it, said: "I apprehend that certainly no authority has been cited to show that this notice of abandonment is to be considered necessary in cases where no such advantage could possibly accrue to the underwriters" (p. 165). But, weighty as these expressions of opinion undoubtedly are, they do not amount to principles treated by the House of Lords as the basis of their decision, for the true and sufficient basis of the decision was the first ground, viz., that there existed in the case they were trying no property, or thing, or right that could be abandoned. And, regarded simply as dicta, they must of course be considered in conjunction with the decision of the Court of Appeal in *Kaltenbach* v. *Mackenzie* (3 C. P. D. 467).

should at once be given, notwithstanding it may happen that the notice can be of no possible service or advantage to the underwriter. Lastly, an election in this sense is always possible where there remains in existence any part of the property or thing insured, or any pecuniary right springing out of its existence; for the assured may always elect to retain his property in preference to claiming on the footing of a total loss (*x*).

It is to be observed, however, that the mere act of claiming a total loss from the underwriter is equivalent to a notice of, for it implies, an abandonment; and therefore, if such claim is made at the earliest practicable time after receipt of advices of the loss, it may well be that no other or former notice of abandonment is in such case requisite.

At what Time the Notice should be given.

§ 145.—The time at which the notice of abandonment is to be given is a matter of the first importance. The proper time for giving it is, as we learn from the judgment

(*x*) The leading cases on this subject are, *Roux* v. *Salvador*, 3 Bing. N. C. 266; *Knight* v. *Faith*, 15 Q. B. 649; *Rankin* v. *Potter*, L. R. 6 H. L. 83; and *Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467. The result may be roughly summed up as follows:—In *Roux* v. *Salvador*, Lord Abinger laid it down that notice of abandonment was never requisite but when the giving it might possibly be of service to the underwriters. In *Knight* v. *Faith*, Lord Campbell held that whenever the subject-matter insured remains *in specie*, though in a damaged state, a notice of abandonment must be given, not merely to enable the underwriters to make the most of the proceeds, but likewise to give them the means of inquiry and of guarding against fraud (see p. 659). *Rankin* v. *Potter* establishes that where neither property, nor right founded on property, exists so as to be transferable to the underwriters, no notice of abandonment need be given. Lastly, *Kaltenbach* v. *Mackenzie* determines that where such property does exist, although under circumstances such that the underwriters could do nothing after abandonment to diminish or alter their loss, notice must be given. Here we have a series which may plausibly be described either as a process of gradual specification or a seesaw.

of Cotton, L.J., above quoted (*y*), "as soon as" the assured "has the information which enables him to make his election." He certainly cannot give effectual notice of abandonment until he has received fairly authentic or credible information of a state of facts such as entitles him to treat the loss as total; and he must not delay the notice after that time, longer than is reasonably necessary for making up his mind what course he will take. This rule, however, simple as it is in theory, is by no means always easy of application. The knowledge of the facts, especially when it comes by telegraph, usually comes upon the owner by degrees, and it may not be easy to determine at what precise point the decisive piece of intelligence, which warrants and necessitates the notice of abandonment, reaches him.

It may be convenient to classify the several cases which arise in practice in the following manner:—Either the action to be taken with regard to the disposal of the property is to be taken by the assured himself, that is to say, by the owner of the goods or the ship, or it has been already taken for him by the captain, acting as the agent of necessity when there is no time for consulting the principal. In the first of these two cases, a further subdivision is to be made: the conditions which must determine the election either are known and definite, or they depend on the chances as to some future event at present uncertain.

§ 146.—First, then, of the case where action is to be taken by the assured himself, and where the conditions which should determine it are definite and can be known. This may be either as to cargo or as to the ship.

For cargo. As to cargo, the only case which need here be discussed is that in which it is a question of abandoning the cargo, when this is at an intermediate port, and the practicability of carrying it to its destination is doubted. Before abandoning, the assured must be in possession of information

(*y*) *Ante*, p. 154.

sufficient to found a reasonable belief that it is impossible, or not worth while, according to the tests already pointed out, to have the cargo sent on to its destination, in the same or any other vessel. He is entitled, and indeed bound, to wait for information sufficient for this purpose; that is to say, for such information as he would reasonably wait or ask for, were he uninsured. There may be cases in which the owner of the goods may be justified in asking and waiting for surveyors' reports as to the actual condition of the goods, estimates of the cost of forwarding, or other such particulars. But so soon as the information which he has received, though it be far short of technical or legal proof, is sufficient to make it clear to his mind what course it would be best for him to pursue were he uninsured, he ought to make his election, and, if he elects not to forward, to give his notice of abandonment at once. He must on no account lie by to watch the changes and chances of the market, otherwise his right to abandon is gone (*z*).

§ 147.—The same principle should regulate the conduct of a shipowner, whose ship is in a place of safety, but so damaged as to make it questionable whether she is worth repairing. Before abandoning, the assured must have a sufficient ground for doing so; that is, information, such as a prudent man would trust and act on were he uninsured, as to the extent of damage suffered by the ship, and the probable cost of repairing it. Till these two matters are known with some accuracy, it is impossible to determine prudently whether to repair or not. A delay for surveys and estimates, sometimes even for absolute tenders for repairs by a responsible shipwright, in which all unascertained damage shall be included, may in some cases be not only justifiable but necessary before abandoning, especially if the probable cost of repair comes very For ship.

(*z*) *Gernon* v. *Roy. Exch. Ass. Co.*, 6 Taunt. 381, at 387; and see *Stringer* v. *English & Scottish Ins. Co.*, L. R. 4 Q. B. 676, 5 Q. B. 599; and *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 120.

close to the value of the ship when repaired. But no delay for these purposes can be permitted, when the information already received, though imperfect, is such as would suffice to determine the conduct of a prudent owner if uninsured (*a*).

When result uncertain.

§ 148.—The proper time to abandon is still harder to hit, when account has to be taken of the chances concerning matters future and uncertain. In the case, for example, of a ship stranded or sunk, the question whether to go to expense in the attempt to float her may involve several uncertainties: it may be doubtful whether the attempt will succeed, how much it will cost, how badly the ship is or will be damaged before she is got off, and whether, after all, she will be worth the two expenses of getting her off and repairing: besides which, the question what is to be done may be complicated by there being cargo on board, which it may be the shipowner's duty to save.

Let us begin by clearing away this last complication, as to the cargo; since, when there is cargo on board a ship stranded or sunk, the question as to saving the property as a whole, or so much of it as can be saved, must take precedence of the question as to abandoning the ship to the insurers. The first thing to be considered is, whether the ship and cargo may best be saved conjointly or separately. If the best or only way is to save them conjointly, as by going to expense in heaving off or lifting the laden ship, then the question will be whether, taking account of the estimated expense, chances of failure, and probable value of the entire property when saved, the undertaking will be prudent, or such as a reasonable man would venture on were the whole property his own and uninsured. If, on the best judgment that can be formed at the time, it would be prudent to incur the expense, that course should be taken; in which case the owner of the cargo and the underwriters on the

(*a*) See *Currie* v. *Bombay Native Ins. Co.*, L. R. 3 P. C. 79.

ship and freight will be liable for their due shares of the expense, whether the undertaking be successful or not (*b*). If not, the time has come to give notice of abandonment to the respective underwriters, who possibly may be more venturesome, and at all events are entitled to have the option of running the risk. If, on the other hand, the state of things is such that the property can most advantageously be saved piecemeal or by degrees, as by first taking out the ship's stores and the cargo, and then floating the hull thus lightened, then in the great majority of cases, if not invariably, the question as to abandoning the ship should be postponed until the cargo has been placed in safety; and this for two reasons: first, because if the underwriters accept the abandonment and take possession of the ship, the process of saving the cargo may be interfered with, and the shipowner may in consequence incur liabilities towards the owners of the cargo; and secondly, because the chances of saving the ship may in general be more accurately estimated after the cargo is out than before it. This general rule, however, is of course subject to exceptions: should the impossibility of saving the ship be clear from the outset, it may be necessary to give notice of abandonment earlier.

§ 149.—When this complication as to the cargo has been got rid of, the course to be taken by a shipowner with regard to abandonment becomes clear. In principle, all that is to be done is to estimate the money-value of the chance of failure to float the ship, and then the conditions of the calculation are, on one side, so much probable outlay, and

(*b*) The representatives of the cargo should in general be consulted, if practicable, at least by way of precaution, in case there should be a fair room for doubt as to the propriety of an undertaking which may fail. But, should some of them unreasonably refuse, it cannot be said that the shipowner, who as carrier is responsible for the due care of the cargo during the transit, would be justified in desisting from an attempt to save the whole, if in his judgment such an attempt would be prudent If so, he would be entitled, it is conceived, to recover the due proportion of the expense, in case of failure, even from those owners of the cargo who have refused to authorise the undertaking.

on the other, a given chance of saving a ship problematically worth so much. If the latter outweighs the former, the attempt should be made; if not, the point has been reached at which the owner should without delay give his notice of abandonment.

Sale by captain.

§ 150.—Thus far we have been speaking of cases in which the course to be taken with regard to the saving or disposing of the property is left to be determined by the assured himself. We are now to consider those in which it has been already determined for him by the independent act of the shipmaster when beyond reach of communication with his principals. This case, owing to the general use of telegraphs, is of course much rarer than formerly. The rule applicable to it, so far as can be gathered from the decisions of our Courts up to the present time, appears to be this: that if, at the same time when the assured first hears of the casualty which occasions a total loss, he likewise hears that his property has been sold by the master of the ship, his duty, if there can be the least doubt as to the propriety of the sale, is immediately to give notice of abandonment; and, even should there be no doubt on the subject, it is his safest course to do so, because he has the possible right of election to retain the proceeds; though in the latter case it cannot be so confidently affirmed that he is bound to give notice as in the former. The right of the master to sell either ship or cargo is strictly limited to the case of necessity: and by "necessity" is here to be understood such a state of things as admits of no alternative but either to sell or leave the thing to perish. Such a state of necessity may indeed arise, notwithstanding that the property may be eventually saved by the purchaser, and this at an expense considerably below its value. The state of things at the time when the master resolves to sell is what is to be considered. If the ship and cargo are in a position of danger, from which they can only be rescued by incurring certain expense, and if the captain,

taking the best advice within his reach, and forming the best judgment he can, honestly and judiciously believes that it is better not to incur the risk and expense, and if, moreover, there is no time for delay to consult the owners, but he must either sell at once or leave the property to perish, such a sale is justifiable, and will give a good title to the purchaser, notwithstanding that the latter may run the risk, incur the expense, and make a large profit by the transaction. But such sales by a shipmaster are always watched with suspicion. A sale made without necessity is null and void. The underwriters therefore ought always, where there is any possibility of impugning the sale, to have the earliest opportunity of at least instituting enquiries on the subject; which opportunity there is no better way of giving them, than by insisting on the necessity of an immediate abandonment. In these cases therefore the severer view of the doctrine of abandonment is probably on the whole the most useful, and is likely to be supported by the Courts. There is really no hardship in it on the assured, when the rule is once understood (*c*).

(*c*) There is a passage in the judgment of Brett, L.J., in *Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467, which shows that a notice to abandon is certainly prudent, if not necessary, in all such cases: "I am not prepared to say," he says, "that if it could be shown that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear, before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment; but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not. That is the limit to which I think the doctrine could be carried, and it seems to me that to go further than that would let in the danger, to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract" (at p. 475).

See, however, *Idle* v. *Royal Exch. Co.*, 8 Taunt. 755, and *Mount* v. *Harrison*, 4 Bing. 388; but these cases can hardly be relied on in the face of more recent decisions.

Effect of Notice of Abandonment.

[illegible] § 151.—If the assured abandons, he must abandon the whole thing insured: he is not at liberty to pick and choose, abandon some part and take to the remainder. But the *whole* here intended must, it is conceived, be the same whole which can be the subject of a total loss as explained above: that is, if two commodities of different kind are insured in the same policy, the assured may abandon one of them and retain the other.

Notice in writing. § 152.—A notice of abandonment should be clear, unambiguous, and unconditional. To prevent mistake, it is better it should be in writing, though this is not essential. And, for the same reason, it is advisable, yet not obligatory, to use in the notice the technical word "abandon," the force of which is well understood (*d*).

Effect of giving no notice. § 153.—If, whether designedly, or through inadvertence, neglect, or ignorance of the law, the assured has not given a notice of abandonment when he ought to have done so, his right to claim a total loss is gone. All that he can do in such a case is, first to act as he thinks best with regard to the disposal of his property, and then to claim under his policy on the footing of a particular average. He may, for example, sell his ship, and then claim, not the difference between the proceeds and the policy value, but a not larger sum based on the estimated cost of repairing with the usual deductions. This he is entitled to, notwithstanding that the repairs have not been actually effected (*e*).

Duty of underwriter. § 154.—When notice of abandonment has been given, the underwriter, if he means to accept it, should do so at once. If he returns no answer, it is now settled that he must be taken to have declined to accept (*f*).

The effect of his declining is merely that the assured is

(*d*) See *Currie* v. *Bombay Native Ins. Co.*, L. R. 3 C. P. 72.

(*e*) *Knight* v. *Faith*, 15 Q. B. 649.

(*f*) *Provincial Ins. Co. of Canada* v. *Leduc*, L. R. 6 P. C. 224, at 237.

left to make out his title to recover a total loss in due time. Strictly speaking, he is probably entitled forthwith to claim the sum insured, provided he is in a position to prove the loss total, leaving the underwriters to dispose of the wreck; but in practice this is rarely done. The assured may, if the abandonment is declined, and no special instructions given by the underwriters, at once proceed to take the proper steps for the disposal of the property; in doing which he is regarded in law as the agent of the underwriters, and therefore, like any other agent, responsible to them for using reasonable judgment and diligence in his agency (*g*).

Effect of acceptance.

§ 155.—Supposing the underwriter accepts the abandonment, he thereupon becomes liable to pay the sum insured, and has the property to deal with as he pleases. Such a settlement, in the absence of fraud or undue concealment or misrepresentation on the part of the assured, is conclusive, and cannot be opened on account of a subsequent change of circumstances. Thus if a ship is captured, and the loss thereupon paid, her subsequent recapture does not entitle the underwriter to claim a refund; the ship remains his property; though if the recapture had taken place after notice but before acceptance of abandonment, and before the issuing of a writ (*h*), the assured would have lost his right to claim a total loss.

The waiver clause.

§ 156.—An underwriter who wishes not to accept an abandonment, and yet to take steps for the recovery or disposal of the property, is placed in a difficult position, since it is hardly possible for him to adopt active measures of any kind for the purpose, without drawing upon himself a species of ownership, from which an acceptance of the abandonment may be implied. To meet this difficulty,

(*g*) See *per* Blackburn, J., in *Stringer* v. *Engl. & Scott. Mar. Ins. Co.*, L. R. 4 Q. B. 676, at 686; *Roux* v. *Salvador*, 3 Bing. N. C. 266, at 287; and *per* Willes, J., in *Potter* v. *Rankin*, L. R. 3 C. P. 562, at 573.

(*h*) The issuing of a writ has the effect of drawing an imaginary line at that date, so that all facts which happen subsequently are ignored.

it is now very usual to insert in policies what is called the "waiver" clause,—an authority for either party to act in the saving of the thing insured without its being deemed an acceptance or waiver of abandonment. This clause may occasionally be serviceable to the assured likewise, as obviating any inference that might be drawn from his conduct, to the effect that in the disposal of the property he was acting, not as agent for the underwriters, but on his own behalf.

Abandonment of ship transfers freight.

§ 158.—An abandonment has the effect of a transfer of the thing insured, with all rights and incidents appertaining to it, from the assured to the underwriter. This transfer takes effect, not from the time of the abandonment, but from that of the accident which justified it (*i*).

The abandonment of the ship, it has been decided, carries with it the ship's earnings from the date of the accident. The freight, as a consequence of the rule of English law which recognizes no *pro ratâ* freight or proportionate freight for a partial carriage, is treated as earned by the performance of the final stage in the carriage only. It follows that if the ship arrives and earns her freight, and is then abandoned to the underwriters as not worth repairing on account of damage suffered in the voyage, the underwriters on the ship are entitled to the freight. Yet, since the freight has in fact been earned, and is lost to the owner, not by any peril insured against, but by reason of the abandonment to the underwriters on ship,—a matter with which the underwriters on freight have nothing to do,—it has been decided in the House of Lords that there is in such a case no liability on the part of the underwriters on freight (*k*). Thus,

(*i*) *Stewart* v. *Greenock Mar. Ins. Co.*, 2 H. L. Ca. 159; *Scottish Mar. Ins. Co.* v. *Turner*, 1 McQueen's Sc. Ap. 342.

(*k*) *Scottish Mar. Ins. Co.* v. *Turner*, 1 McQueen's Sc. Ap. 342. This decision has been much questioned; see *per* Willes, J., in *Potter* v. *Rankin* (L. R. 3 C. P. 562, at 570—571), *per* Cockburn, C.J., in the same case on appeal (L. R. 5 C. P., at 374), and *per* Brett, J., before the Lords in *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 100: and if may

between the two, the shipowner loses his freight without compensation.

This rule only applies to freight earned under a contract, and earned by the ship herself. If the cargo belongs to the shipowner, the underwriter is entitled, not to freight for the entire voyage, but merely to an equitable compensation for the use of his ship, during the transit from the place where the accident occurred to the port of destination (*l*). And, if the ship is condemned at a port of refuge, and the freight is earned by means of transhipment, no freight can be claimed by the underwriters on the ship (*m*).

It is obvious that there is here something wrong. However convincing may be the arguments, taken separately, by which each of these decisions is supported, the results cannot stand together. It cannot be right that the shipowner should recover on the whole a larger sum if his ship is lost at sea than if she is lost to him by not being worth repairing. It cannot be right that the thing insured by a policy on ship should be for one purpose treated as excluding the freight, and for another as including it. If the ship's earnings under her contract are a part of the thing insured as ship, the shipowner ought not to be allowed to insure them a second time under the name of freight. If they are no part of that thing, the insurer of it ought not to be allowed to take them.

The truth is that the rule of law which gives the ship's earnings under her existing contracts, after abandonment, to the underwriter on the ship, is founded on a partial and confused apprehension of the fact, that the ship's

possibly be argued that the principle laid down by the House of Lords in this last case is really fatal to it. That seems a doubtful point; but in any case, for the reasons given in the text, it is not the non-liability of the underwriter on freight, but the right of the underwriter on ship to take the freight, which is contrary to the theoretical principles of insurance.

(*l*) *Miller* v. *Woodfall*, 8 E. & B. 493.

(*m*) *Hickie* v. *Rodocanachi*, 28 L. J. (Exch.) 273.

value is constituted by her future earnings, of which that in actual process of being acquired is a portion. This subject has been considered at large in the first chapter of this volume. It was there pointed out that the right to insure freight as well as ship is only to be justified on the understanding that what is insured by the policy on ship is merely a portion of the ship's real value to her owner (§ 18). The ship, as a machine for earning freight, has no other pecuniary value but the estimated aggregate of her future earnings. At any given time, the freight she is in process of earning is as much a portion of the ship's value as any of her future freights. It is convenient for practical purposes to make an artificial division between these two elements of the ship's value, the freight contracted for, and the freights which are still in the future. But this distinction, once made, should be carried out consistently. It should be understood that what is abandoned to the underwriter on ship can only be, that portion of the assured's interest which was originally the subject of insurance. To say that the freight is insurable by a separate policy because what is insured under the name of the ship is only the ship's value excluding this particular freight, and yet to say that because the ship is abandoned this particular freight is to form a part of that which was insured as ship, is hardly less unreasonable than it would be to say that the underwriters on the ship should upon abandonment be entitled to any cargo on board that might happen to belong to the shipowner.

However, the law on the subject appears to be absolutely settled. The only remedy practically within the reach of a shipowner is, to insert in his policies on ship some such clause as, "In case of abandonment, the underwriters on this policy undertake not to claim the freight."

Subject to what expenses.

Since the abandonment operates as a transfer of the ship and freight from the date of the accident, it follows that all expenses and liabilities incurred subsequently to that date, such as the wages of the crew, port charges at

the place of destination, and the like, must fall on the underwriter. The crew from that date become his servants, and he must be liable for their faults, as for example in case of collision through improper navigation.

Abandonment of freight. § 159.—Thus far nothing has been said as to an abandonment of the freight. If the view taken in the earlier part of this chapter as to the liability of an underwriter for the total loss of freight (*n*) is correct, it seems to follow that an abandonment to the underwriter on freight is in no case necessary; for there can, in no case in which he is liable for a total loss, be anything to abandon. I except only the obvious cases of a total loss by capture or for a missing ship; in which there must be an abandonment of the chance of recapture or unexpected arrival. In cases where the result is known, I can think of no possible salvage to the freight-underwriter. If any gain is to be made by transhipment, there is no total loss of freight (*o*). If freight is earned by repairing a ship after abandonment, that freight must belong to the underwriters on ship who have repaired her. Even where a ship stranded or sunk is abandoned to underwriters, and these succeed in floating her and earning freight, that freight must belong to them and not to the insurers of it.

(*n*) *Ante*, § 141.

(*o*) See, however, as against this the dicta of Brett, J., in *Rankin* v. *Potter*, L. R. 6 H. L. 83, at 102—103, and of Cockburn, C.J., in *Potter* v. *Rankin*, L. R. 5 C. P., at 371.

CHAPTER VI.

PARTICULAR AVERAGE.

Definition.

§ 160.—PARTICULAR average is a portion of the indemnity furnished by insurance which it is in an especial manner necessary to fence off from the rest by exact boundaries, because insurance is frequently effected with exclusion of this portion, and in all policies the liability for particular average is subject to certain restrictions, which do not apply to claims of another kind.

One portion of the boundary line has already been marked, in defining total loss: for particular average and total loss are mutually exclusive. On the other side, as will be seen more at large in the following chapter, neither a claim under the "sue and labour clause," nor a claim for contribution to general average as such, is particular average.

Thus particular average may be defined, loss or damage of the thing insured, not amounting to total loss, and not including the cost of measures taken for its preservation from a greater loss (*a*). The term total loss in this definition is to be understood throughout in the sense defined in the preceding chapter. No loss which is either actually

(*a*) In *Kidston* v. *The Empire Mar. Ins. Co.*, L. R. 1 C. P. 535, the jury found that, by well-known usage, the term "particular average" denotes actual damage done to, or loss of, part of the subject-matter of insurance, but does not include expenses incurred in recovering or preserving the subject-matter (at p. 538).

or constructively total, is particular average. As respects merchandize, the total loss of a portion only of any one distinct commodity insured is only a particular average. And so throughout; in defining the boundaries of the former, those of the latter are so far marked out at the same time (*b*).

(*b*) Concerning the origin of this word "average" there has been much unprofitable discussion. As a technical term of maritime law, the word is used in a sense entirely different from that which it has in ordinary discourse; and it is, perhaps, now scarcely possible to trace the series of analogies by which the sense has passed away, on either hand, from the derivative meaning, which latter indeed is itself still in dispute. Supposing the controversy as to the true origin of the word be considered as narrowed to the question, whether, as Mr. Maclachlan contends, it is a survival of the Latin *aversio*, or, as is suggested by some old Pisan and Florentine Ordinances, it is traceable to the Italian *avere*, the property or common stock; or, indeed, if we suppose both these theories to be erroneous, and the true root of the word not to have been yet determined; certain it is that, at some period anterior to its adoption as a term of modern maritime law, its meaning underwent a change, the precise nature of which can now only be a matter of speculation. Its first appearance on the stage of legal history, as a term possessing a fixed meaning, is its definition in the *Guidon de la Mer*, which is substantially repeated in the Ordonnance of Louis XIV. In this latter we have a formal definition, which was spread throughout Europe, being copied into most if not all of the maritime ordinances, which rapidly followed the Ordonnance in one Continental state after another. As for our own law, we have seen that while we had insurance in practice, and no doubt a body of practical rules for it, from perhaps the 14th or 15th century, yet as a body of case law, or law recognized as such in the Courts, we go no further back, substantially, than to what Lord Mansfield imported through Valin and Emerigon from the Ordonnance of Louis XIV. There can be little doubt, therefore, that when the word "average" was first heard in English Courts of Law, it must have been understood in the sense defined in the Ordonnance, and that whatever changes it has since undergone—as some it undoubtedly has—must have been moulded on this original form. Now the words of the Ordonnance are:

"*Toute despense extraordinaire qui se fera pour les navires et marchandises conjointement ou separément, et tout dommage qui leur arrivera depuis leur charge et depart jusques à leur retour et decharge, seront reputez avaries. Les despenses extraordinaires pour le bâtiment seul, ou pour les marchandises seulement, et le dommage qui leur arrive en particulier, sont avaries simples et particulieres; et les despenses extraordinaires faites, et le dommage souffert pour le bien et salut commun des marchandises et du vaisseau, sont avaries grosses et communes. Les avaries simples seront supportées et payées par la chose qui aura souffert*

We are to consider in the next place the precise nature of the indemnity given as particular average, and this must be done under three principal heads, as particular average on cargo, particular average on ship, and particular average on freight. The principles on which the three are calculated or adjusted lead to complications as to which one kind has little that is common to the others.

PARTICULAR AVERAGE ON CARGO.

Principle.

§ 161.—A claim for particular average on merchandize arises, either when a portion of some one commodity insured is wholly lost or destroyed, or is necessarily sold before reaching its original destination, or when merchandize which reaches its destination is reduced in value through being damaged by some peril insured against.

When part totally lost.

The adjustment of the former of these cases presents no difficulty. The insurer is to pay the value in the policy of that portion which is totally lost or sold short of its

le dommage ou causé la despense, et les grosses ou communes tomberont tant sur le vaisseau que sur les marchandises, et seront regalées sur le tout au sol la livre." (Ordonn. Tit. 7, Arts. 1—3. 4 Pard. 380. For the shorter definition in the *Guidon*, see my book on "General Average," p. 275, of 3rd edit.)

Thus we have the word average used as synonymous with every kind of loss or expense coming within the general term "accidents of navigation." This is the first meaning of the word that can be termed historical. Its later changes have all been narrowings, the natural result of a growing precision of legal definition. First, a division is made between total and not-total losses, and then the word average is confined to the latter. Later, a division is made between claims in respect of the loss or injury of the subject-matter insured, and expenditure to prevent a greater loss; and then the word average is restricted to the former. The controversies which may be traced in the law-suits of the last twenty years show a gradual mutation, or perhaps a gradual specification, in the meaning attached to this only too flexible word. That the controversies are not over, and consequently the specification not yet complete, will be shown in the following chapter.

destination, taking credit, in the latter case, for the amount realised by the sale. The policy-value of any portion is, when the packages are not valued separately, determined from the policy-value of the whole, by a rule of proportion based on the relative invoice or market values of that portion and the whole. The invoice value is most ordinarily taken for this purpose, from analogy founded on the method of determining the amount of interest on an open policy. For the reason given in § 31, n. (*g*), this method is not correct in the case in which there has been, between the date of purchase and sailing or insuring, a rise in the market for some and not other of the commodities included in one invoice, or a higher rise on some than others.

§ 162.—When the claim is for damage to goods which reach their destination, a complication arises from the fluctuation of the market there, which renders it necessary to devise some means of separating the loss resulting from the sea-damage from the loss or gain attributable to a change in the market. Were the underwriter in such cases simply to pay the difference between the policy-value and the net proceeds, then, supposing the policy-value to represent (as in theory it ought) the amount of net proceeds as expected at the time of insuring, he would be paying, if the market fell in the meantime, the loss by sea-damage *plus* the loss by fall of market, and if it rose, the sea-damage *minus* the gain by its rise. **When goods arrive, but are damaged.**

To meet this difficulty, some third term must be taken into account; and this must be, the amount for which the goods would have been sold, had they been sound, on the day when the damaged goods were sold. The difference between these two represents the merchant's actual loss by sea-damage; and the per-centage which this loss gives on the sound value shows how much per cent. the goods are intrinsically damaged. Then we are to treat a depreciation of so much per cent. on the same footing as if that proportion or per-centage of the goods themselves had

been destroyed; such a proportion of their value has in fact been effaced: consequently, the underwriter is to pay that per-centage on the value in the policy.

Gross or net proceeds.

§ 163.—Thus far, all are agreed that this is the true solution of our problem. The loss by sea-damage, and the loss or gain by a change in the market, are in this way perfectly separated from one another. But now arises a question, as to which opinions are still divided (*c*). Ought we, for the purpose of this comparison, to take the gross or the net proceeds of the sound and damaged goods?

The difference between the two methods, which may be considerable, arises from this: the freight, and other ordinary charges to which the goods are subject at the port of discharge, are or may be the same in amount when the goods are damaged as when sound; therefore, they always form a heavier per-centage on damaged than on sound goods; and a comparison of net proceeds must, as a rule, show a heavier depreciation than one made on the gross (*d*).

Each of these methods is open to a strong objection to it, and the real question is, which of these is the stronger. If we adjust on the comparison of gross proceeds, we never, supposing the assured to have insured that amount which on true principles he ought to insure, fully indemnify him for his actual loss. If we adjust on the comparison of net proceeds, we never can make the fluctuations of the market wholly immaterial to the underwriter. On one side or the other, we fall short of that ideal perfection indicated in the Introduction: we have not a state of

(*c*) "The subject of gross or net proceeds has, in spite of this unreversed decision," (*Lewis* v. *Rucker*), "remained a vexed question ever since. Each new generation of merchants coming to effect insurances stumbles at the same difficulty, and asks for a solution of it in nearly the same words." (Hopkins, "Handbook of Average," 3rd edit., p. 241.) The state of things could hardly be more graphically or accurately described.

(*d*) In exceptional cases it may be otherwise, as, when there is a refund of duty on damaged goods which happens to exceed the ratio of depreciation, but this is an accident, and occurs but seldom.

things in which the underwriter can disregard the market and the assured can disregard the perils of the seas. And the reason why this ideal perfection cannot be perfectly attained has been already pointed out (*e*). All that can be done is to make the best approximation; and, when one of these two purposes of insurance must give way to the other, to let that give way which is the less important. That is the choice we have here to make.

As a matter of principle, it seems clear that the arguments in favour of the adjustment on net proceeds preponderate. The question really is, how much, or rather in what proportion, the thing insured is deteriorated. Now the thing insured is not the merchandize, but the interest of the assured in the merchandize. That interest, the expectation of gain which is the true thing insured, is, not the gross but the net proceeds. To say that it is the prime cost is merely to say, with somewhat less accuracy, the same thing. A merchant purchases goods and sends them over sea for no other reason, but because he hopes to sell them so that they shall bring in net as much as they have cost and something more. This calculation supposes that he has in his mind deducted the freight and charges, and taken account not of the gross but the net proceeds of their sale. Thus what he really insures is, a balance which is expected to remain after deducting certain fixed charges. In this respect his position is precisely analogous to that of a shipowner who insures a balance of freight expected to be due after the deduction of a lump sum prepaid: and as we know, on the authority of the House of Lords, that in such a case the ratio of depreciation is to be computed by deducting the amount prepaid from each side of the account (*f*), it is not easy to see why—apart from authority—a different rule should be applied in the case of merchandize. With regard to the argument on the other side, that an under-

(*e*) *Ante*, § 30, n (*b*).

(*f*) *Allison* v. *The Bristol Mar. Ins. Co.*, L. R. 1 Ap. Ca. 209.

writer's liability ought not to be affected by a rise or fall of market, there is in it this fallacy: an underwriter, it is true, ought not to be liable for losses *occasioned* by a fall of market, but it is a very different thing to say that an underwriter's liability shall not be indirectly and incidentally affected by such a fall,—which is all that is here suggested. Under the system of adjustment by comparison of net proceeds, the direct and immediate cause of the assured's loss is a peril insured against, and the fall of market only comes into play remotely and incidentally. Incidentally, the rise and fall of markets continually and of necessity does affect the amount of an underwriter's liability, as for instance when he has to pay for new sails, and the price of canvas has gone up, and in a great variety of other such cases.

But it seems hardly worth while to argue the question at any length. As has been said, it is not so much a question between what is absolutely right and absolutely wrong, as between two methods of adjustment neither of which reaches the standard of theoretical perfection. The system of adjustment by gross proceeds, adopted on the authority of Lord Mansfield (*g*) and Lawrence, J. (*h*), has been in use in this country for about a hundred years, and has worked on the whole, in spite of complaints which are still heard occasionally, to the tolerable satisfaction of the mercantile public. If any merchant wishes for a more complete indemnity, he has the remedy in his own hands, by requiring the insertion of the clause "particular average to be adjusted by comparison of net proceeds;" and that this is so seldom asked for seems to prove that there is no great dissatisfaction with the system at present in use.

Practical Rules.

Practical rules of adjustment.

The rules for adjusting particular average on merchandize, are, then, as follow:—

(*g*) *Lewis* v. *Rucker*, 2 Burr. 1167. (*h*) *Johnson* v. *Shedden*, 2 East, 581.

§ 164.—When the goods insured, or any part of them, reach their destination in a damaged state, the first thing the assured has to do is to provide for realizing the proceeds in such a manner as at once to obtain the best prices he can, and to be in a position to prove, in case of need, that he has done so. For this purpose, a sale by auction is most commonly resorted to. It cannot be laid down that this is absolutely necessary: there may be cases in which a sale of sea-damaged goods by private contract is clearly advisable; but this latter method being open to various abuses, care should in general be taken not to use it except either when there is mutual confidence between the assured and his underwriters, or when the assured is able to prove, or satisfy the underwriter, that such a sale will be to his advantage as compared with an auction. **The auction.**

§ 165.—In determining what goods are to be sold by auction, or, as it is not quite correctly called, "for account of underwriters," the general rule is that nothing is to be thus sold except that portion which is actually damaged, or affected in its value by the damage. This may raise questions of some nicety. With regard to piece-goods, when the damage has not penetrated the entire bale or case, the most advantageous method usually is to separate the damaged pieces, and sell these only by auction, disposing of the remainder as sound. So when cotton or wool is damaged, it frequently is advisable to pick off the damaged portion, and confine the claim on the underwriters to the loss of that part only. Strictly speaking, it is the duty of the assured, in matters of this kind, to adopt such a course as he would as a matter of prudence follow, were he uninsured, in order to make the loss as light as possible. **Separation of damaged portion.**

§ 166.—The question may arise, however, whether, after a separation of this kind has been made, supposing there is a loss in price on the sound portion of the package thus remaining, either because the broken portion of a **Of loss by breakage of assortment.**

package is less convenient for sale, or because of a suspicion in the mind of buyers that some taint of damage may remain, or because an assortment is broken, the underwriters are liable for this loss. Some of the older writers on insurance hold that they are not, on the ground that this loss is not a direct and necessary consequence of the perils insured against (*i*). The question was partially brought before the Court of Common Pleas, in a case where the attempt was made to claim from underwriters on a cargo of tea, not merely the damage to the chests of tea which had been touched by seawater, but also an alleged loss on the sale of chests belonging to the same chop or brand which were perfectly sound, by reason of a suspicion, acknowledged to be groundless, that the flavour of the sound tea might be affected by the presence of damaged tea in the same ship; and it was determined that such a suspicion did not warrant a claim on the underwriters (*j*). But the decision would probably have been the other way, had the suspicion been a reasonable one, or had there been fair room for doubt on the subject; and it certainly would have been the other way, had it been possible to prove any real change of flavour from the cause assigned. For, the remoter effects of sea-damage, such as a change of flavour in one portion of a cargo resulting from the wetting of another portion by seawater, are certainly recoverable from underwriters (*k*). And with regard to the breakage of an assortment, resulting from the damage to this or that article requisite for its completeness, there can be no reasonable doubt that this is a loss from which underwriters are liable; as, for example, if a machine consisting of several pieces which are packed separately is rendered useless by damage done to any one of the several packages. Baily, in his "Perils of the Seas," points out a possible exception

(*i*) Stevens on Average, pp. 155—158; Benecke, 437, 438.

(*j*) *Cator* v. *Great Western Ins. Co. of New York*, L. R. 8 C. P. 552.

(*k*) *Montoya* v. *London Ass. Co.*, 6 Exch. 451.

to this rule, in the case of an absurd or unusual kind of assortment; as where two packages of boots or shoes are sent out, with all the right feet in one package and all the left in another. The consideration of this question may, however, be not unprofitably left until the case shall actually arise. Or, again, if the portion of a package, though composed of sound goods, is less saleable than an entire package for any other substantial and not merely fanciful reason,—as, for example, if the packages are to be sent on the backs of mules into the interior, and a package smaller than the ordinary size is really worth less because of the difficulty of balancing it for such transport,—it is not easy to see how such a loss can be described as anything else but a direct consequence of the peril which necessitated the breaking up of the original package.

§ 167.—The next step to be taken, when the damaged goods have been sold by auction, is to determine what those goods would have been worth in the same market had they been sound. Sound value.

Concerning this, care is to be taken that the conditions of the "sound value" shall be exactly equalized with those of the auction sale, otherwise a comparison of the two will not accurately define the damage. The dates must be the same, and so must be the terms of credit, or the discounts for cash payment. Should it happen that the damage necessitates the selling at a different time from that intended, as, through the necessity either for a prompt sale to prevent increase of damage, or for delay in order to assort the damaged goods, any change of market in the interval is to be ignored, and the sound price taken at the date of the auction; whether this is to the advantage or detriment of the assured is fortune of war (*l*).

In calculating the sound value, account is of course to be taken of any change in the weight—or the measure, if

(*l*) *Lewis* v. *Rucker*, 2 Burr. 1167.

the sale is by measure—of the damaged goods, either by absorption of seawater, or by washing away or evaporation through heating. This is commonly done by taking the average weight of sound packages of the same mark.

When the proceeds and the sound value have thus been determined, the difference between the two gives the ratio of deterioration: and, as has been said, the underwriter is to pay this ratio or percentage on the policy-value.

In thus applying the ratio of depreciation to the policy, it is to be noted that, wherever there is a difference between the ratio of depreciation in two or more packages or lots, and likewise a difference in the proportion which the sound value of each bears to the policy-value, it is necessary to make the application of each such package or lot to the policy separately; for the result is not the same if they are lumped together.

In addition to the damage thus computed, the underwriters are to pay the extra charges or costs incurred in consequence of the damage and the claim; such as the fees of surveyors, charges of the auction, cost of adjustment, and the like. These are paid in full, without increase or reduction, whether the sound value be more or less than the value in the policy.

This may suffice, without entering into minute and wearisome details, to explain the method of adjusting a particular average on merchandize. Other complications must be pointed out, when we come to consider the effect of the "Memorandum," and its consequence, the "Average Clauses" (*m*).

(*m*) A short example of a particular average on merchandize is as follows:—

Sugar—1000 bags, policy-value 3000*l.*
Sea-damaged 100 bags, value in proportion, 300*l.*
900 sound bags weigh 2700 cwt.
100 bags should weigh in proportion 300 cwt.

Sound value 300 cwts. at 40*s.* per cwt.	. 600*l.*
Sale by auction 250 cwt. at 38*s.* ,,	. 475
	Loss 125*l.*

PARTICULAR AVERAGE ON SHIP.

§ 168.—The adjustment of a particular average on ship has not the same kind of complication as one on cargo. No enquiry has to be made as to whether the actual value of the ship is greater or less than its value in the policy. The underwriters simply pay, each in the proportion that his subscription bears to the policy-value, the actual cost of the repairs, after excluding such as are due to mere wear and tear, with a deduction, the rate of which is fixed by custom, for the improvement supposed to result to the ship from having new work in place of old. Rules for wear and tear, and for this deduction, are thus the only matters requiring consideration when the ship has been duly repaired; when it has not, other questions arise.

Wear and Tear.

§ 169.—Wear and tear is distinguished from seaperil in not being occasioned by unusual violence or any accident, but by the mere "silent, natural, gradual action of the elements upon the vessel itself" (*n*). The chief seat of wear and tear is naturally that portion of the fabric which is directly used in urging the vessel through the water,—the sails, rigging, and lighter spars of a sailing vessel, and the screw-shaft of a steamer. Wear and tear must be discriminated from seadamage not so much by the kind of weather it occurs in as by the kind of damage done; what is ordinary weather for one season or voyage

If 600*l.* lose 125*l.*, 300*l.* should lose 62*l.* 10*s.*

Extra charges :—

Surveyor's fees .	3*l.* 3*s.*	
Auction expenses .	9 10	
	12 13	12*l.* 13*s.*
	Claim on policy	75*l.* 3*s.*

(*n*) *Merchants Trading Co.* v. *Universal Mar. Ins. Co.*, as cited in L. R. 9 Q. B. 596.

being storm for another, besides that the language of shipmasters varies greatly in intensity of epithet as descriptive of weather.

To distinguish what is wear and tear in particular cases must to a great extent be left to the trained judgment of experts in such matters. Some general rules for their guidance, however, are adopted in the practice of adjusters, which may be brought under the following heads:—

Sails split. § 170.—Sails split or blown away while set are ordinarily treated as wear and tear; but not so, if set when the ship is aground, or if lost in connection with spars carried away, or if blown adrift when furled, or in the act of furling or setting them; and a further exception ought probably to be made, in the case of sails split when the ship is lying to, or scudding before the wind, or when she broaches to. The ground of this rule is, that the mere pressure of the wind upon the sails while the ship is under canvas subjects them to an ordinary continuous strain, the effects of which are every now and then shown by their splitting or giving way.

Rigging and light spars. § 171.—Rigging chafed, stays or running gear parting, from no assignable cause beyond the continuous strain upon them, is for the same reason treated as wear and tear; but not so if the cause of the breakage or chafing is something unusual and accidental, such as the carrying away of a mast, or the like. The same rule, with the same exception, is applicable to light spars, as studdingsail booms, royal and topgallant yards, and the like. What for this purpose are light spars, must be left to the judgment of experts. It seems hardly reasonable that the same rule should serve for small coasters, or yachts, which frequently lose their little spars by carrying on sail, and ships of the largest class, whose topgallant masts may be bigger than the others' topmast or even mainmast. Spars carried away when no sail is set on them are always admissible as particular average.

Screw shaft breaking. § 172.—The breaking of a screw shaft, through mere

wear and tear, is perhaps one of the most ordinary dangers of steam navigation. It is supposed that by the constant revolution of the shaft some process of crystallisation is set up, which by degrees renders the iron brittle, so that it may snap under the mere ordinary strain in fine weather; and this takes place, I am informed, at periods so varying for individual shafts that it is hardly, if at all, practicable to guard against it. Such a breakage, where there is no accident or violence to account for it, can, of course, only be treated as wear and tear. But there is a good deal of floating wreckage in the sea, and cases do occur in which the breakage of a shaft is not improbably attributed to contact with some such thing.

Ground tackle and hawsers.

§ 173.—A ship's ground-tackle, windlass, and hawsers used for mooring, are of necessity subjected to much constant ordinary strain, or wear and tear. For this reason, the rule of practice formerly was to treat the breakage of a hawser, or parting of a chain cable, or breaking down of a windlass, as mere wear and tear, unless it could in some way be traced to an accident out of the common course, such as the falling of another ship athwart hawse, so as to bring a double strain upon it, or the like. Latterly, there has been a tendency to relax this strictness, particularly with regard to chain cables: a duly tested chain, it is argued, ought not to give way except under some extraordinary strain, so that its giving way is itself a proof, not that the chain was faulty, but the strain excessive. This leniency may perhaps in its turn be carried too far.

Caulking.

§ 174.—As for a ship's caulking,—if, without being struck by seas, thrown on her beam ends, or meeting with appreciable bad weather, a ship on a long voyage gradually becomes leaky, this is a suspicious symptom of wear and tear as affecting the hull. If, in such a case, it shall appear that the ship has not been caulked for a long time, the shipowner will probably have difficulty in establishing a claim on his insurers. But these are cases as to which

it is hardly possible to lay down a rule: the principle is, that before an underwriter can be made liable for the caulking, it must be shown that the leakiness has been occasioned by more than ordinary bad weather; and ordinary bad weather is a relative term, varying with the season and kind of voyage; and the application of this principle to individual cases can only be made with the aid of experts.

Metalling clause.

§ 175.—A remarkable attempt has been made in recent times to solve this difficulty by violent means,—by drawing a hard and fast line through the middle of a ship, and declaring that leakiness above that line may be treated as particular average, but all below it, unless caused by grounding or contact with some foreign substance, shall be treated as wear and tear. Such, at least, is the practical effect of the clause called the "metalling clause," so called because the line drawn is in most cases coincident with the line where the metal sheathing of a wooden ship ends. The clause is as follows: "free of particular average below water, unless caused by grounding or contact with some substance other than water." Sometimes, instead of "below water," the clause is "below the water line," or "below the load water line;" the reason being that, when a ship is on her beam ends, or lying over under the pressure of her sails, a large portion of her side is not "below water," and therefore does not fall under the exclusion of the first-named clause. The only thing to be said in favour of this clause is that it does sometimes protect an underwriter against unjust claims which it might otherwise be difficult for him to resist. A shipowner knows, however, that a policy with such a clause is worth very little to him. If underwriters would boldly resist claims for caulking ships in cases where there was good reason to believe that the need for it was due to wear and tear or to a neglect to renew the caulking or metal in due time, there would perhaps be no occasion for this over-stringent clause.

§ 176.—Damage done by the blow of a sea, as when a sea shipped carries away bulwarks, boats, deckhouses, or the like, frequent as such damage is, is in no case treated as wear and tear. **Damage by the blow of a sea.**

§ 177.—In those cases in which the loss is attributable to the conjoint operation of wear and tear and seaperil, an underwriter is liable for such losses as are directly caused by seaperil, though remotely by wear and tear. Thus, if a rope supporting a mast gives way through wear and tear, and the mast breaks for want of this support, it is the storm directly and the breakage of the rope only remotely that breaks the mast. If a careless engineer neglects to keep the boiler duly supplied with water, and then the fire burns a hole in it, this is damage for which the insurer must pay (*o*). If a screw shaft breaks through mere wear and tear, and the broken piece drops into the sea and is lost with the propeller at the end, and water rushes in through the hole and the ship is sunk in shallow water and incurs expense and damage by the grounding, at what point does the liability of the insurer begin? It begins, apparently, so soon as we can find a distinct cause of loss, or something which might or might not have occurred subsequently to the wear and tear. In the case supposed, if we can say that by possibility the broken shaft might have been stopped from running out through its tunnel, then it was an accident that it was not stopped, in which case the underwriter must be liable for the loss of the propeller. If this cannot be said, at least the crew might by possibility have stopped the hole so as to prevent the vessel's sinking: then the not doing so, and therefore the sinking, was an accident, and the *causa proxima* of the damage. **Damage from both causes conjointly.**

§ 178.—Decay, or dry rot in timber, is really a species of wear and tear. A mast, that is more or less rotten, may be sprung in a gale either because it is rotten, or indepen- **Decay.**

(*o*) See *W. India and Panama Tel. Co.* v. *Home and Colonial Mar. Ins. Co.* 6 Q. B. D. 51.

dently of rottenness. In such a case, if the decay was so far advanced that the mast was not fit for the existing voyage, this would amount to unseaworthiness; if so far that, though fit for this voyage, the mast must be replaced at the end of it, then, if it is in fact replaced at the end of it, the springing has occasioned no loss to the owner, and there is therefore no claim on the insurer; but if the mast which would have lasted for the voyage is necessarily replaced at some earlier point because it has been sprung by seaperil, then the underwriter must pay for it: and it seems that the rule should be the same whether the mast would or would not have been sprung in the gale had it not been rotten,—for there is no warranty against any species of defect that falls short of unseaworthiness.

Deduction of One-third.

§ 179.—Secondly, we have to consider the customary deduction made in respect of the improvement of a ship by new work supplied in the place of old.

This deduction, by a very ancient usage not confined to this country, but almost universal wherever insurance is practised, is fixed at one-third. This deduction is made from the cost of repairs only, not from the incidental expenses, such as hire of a dry dock, cost of removals, cartages, use of stages, and the like. From chain-cables, one-sixth only is deducted, and anchors are subject to no deduction at all. Metal sheathing is placed on a distinct footing: the underwriters pay in full for the replacement of the weight stripped off, and the additional weight put on is borne by the owners. No deduction, of course, is made from temporary repairs, or repairs which for any reason have to be done over again.

These rules, which at best furnish a very rough measure of justice, were framed long ago, at a time when ships were smaller and built of wood. For wooden ships this practice has received the sanction of the Courts, but its

applicability to iron ships has been doubted, and the point expressly reserved (*p*). It is very likely, however, that the question, at least so far as particular average is concerned, will never come before the Courts; since there is, on the part of the owners of iron ships, so fixed a determination not to submit to this deduction, that the insertion of special clauses in policies, engaging to pay without deduction of thirds, is now almost universal. The truth is, to deduct one-third from the ironwork repair of the hulls of iron ships, or from iron masts or yards, on the plea of improvement, is a simple absurdity; since to patch new plates on old is rather a detriment than an improvement.

§ 180.—A question of some importance still remains undetermined. On what basis of cost or value ought this deduction of one-third to be computed? The improvement of a ship by the substitution of new work for old is the same, whether the new work has been supplied at a port where materials and labour are cheap or where these are costly. The deduction for improvement ought, then, to be the same in either case. It may easily happen, however, particularly when a ship is driven into a port of refuge to refit, that the cost of repairing is double or treble what it is at the home port. In such a case, ought the deduction for improvement to be more than it would have been, had the same repair been done at the home port? Clearly not, in theory, that is to say, on any grounds of good sense or fairness (*q*). At present, however, according to the practice of adjusters, one-third is deducted from the actual cost, however excessive that may be. It is likely that this practice has grown up through mere inadvertence, and is continued simply because it exists. It has not been sufficiently considered that the necessity for putting into a port of refuge, and therefore

(*p*) *Lidgett* v. *Secretan*, L. R. 6 C. P. 616, at 627.

(*q*) So decided in the Court of Appeal of Rouen, in the case of the *Nueva Providencia*, see *Shipping Gazette*, May 28, 1880.

of repairing the ship at an inordinate cost, is a peril for the whole consequences of which the underwriters are liable, subject only to a reasonable deduction for the improvement which the ship may be supposed to receive. Nor, again, has it been sufficiently considered that it is contrary to public policy, and certainly to the true interest of underwriters in the long run, to encourage total losses by giving an inadequate compensation in the case of particular average.

The deduction of one-third ought not to be (*r*), but in our practice is, made from bottomry premiums, commissions, and the like incidental and proportionate expenses.

First voyage. § 181.—No deduction for improvement is made from the repair of new ships,—that is, ships on their first voyage; and for this purpose a first voyage is taken to be one entire trading voyage out and home, however long or indirect that voyage may be. In the case where this rule was laid down by the Courts, the ship had sailed from London under charter to carry convicts to New South Wales, went thence in ballast to Madras, seeking a cargo, and was damaged on her way from Madras to London (*s*). Here there was an intention all through to work the ship's way back to her starting point, and this in as direct a way as the chances of employment would allow. The decision would probably not be so far extended as to admit of an indefinite number of intermediate voyages, or to cover a ship which might go from port to port with no intention of returning to her starting-point. It is now usual, however, to insert in policies special clauses exempting the ship from the deduction, not for the first voyage, but for a stated length of time, as, for eighteen months for British and twelve months for colo-

(*r*) There is, indeed, an American decision to the contrary; *Orrock* v. *Commonwealth Ins. Co.*, 21 Pickering, 456; Phill. Ins. § 1433; but this seems to go on a principle at variance with those laid down by later English decisions.

(*s*) *Pirie* v. *Steel*, 8 C. & P. 200

nial built ships from the date of launching or builder's certificate (*t*).

§ 182.—Suppose a ship not new to sail on a voyage with a new mast, and this mast to be carried away, the owner is not entitled to have the cost of a new mast supplied at the end of the voyage without deduction of a third (*u*). But if the ship puts back to her starting-point, and a new mast is put in there, no thirds, it is conceived, should be deducted; since in this case there is no gain whatever to the owner. For the same reason, in the case of an iron ship, where a plate is bent through seaperil, and the same plate is taken out, rerolled, and put back into the ship, no one-third should be deducted from the cost of rerolling, because there is no substitution of new for old. New materials in old ships.

§ 183.—The credit for old materials is deducted after the deduction of one-third from the cost of new. In America it is the other way. I venture to think the American rule demonstrably wrong. A new hawser is as much better than an old one, whether any of the old rope is left or not.

Rules for Adjustment.

§ 184.—The principle of a particular average on ship is, that the assured is to be indemnified for the damage done to the ship, or more properly the detriment suffered

(*t*) Suppose a ship, after being repaired, sails again and is wholly lost on the same voyage, ought the deduction of one-third to be made? It may be argued that the ship having never again come, for beneficial purposes, into the hands of the assured, the deduction, which is in respect of benefit received, ought not to be made. This seems plainly reasonable, and is confirmed by the observations of Ashurst, J., in *Da Costa* v. *Newnham*, 2 T. R. 407, and is not contradicted by the American decision of *Humphreys* v. *Union Ins. Co.*, 3 Mason's Rep. 429, both cited in Arn. Ins., p. 1000 of 2nd edit.: though Mr. Baily ("Perils of the Seas," p. 93) is perfectly correct in saying that the decision in *Da Costa* v. *Newnham* is not directly conclusive on the point. I differ with misgiving whenever I differ from Mr. Baily, but on this subject I cannot think his reasoning conclusive.

(*u*) *Poingdestre* v. *Royal Exch. Ass. Co.*, Ryan & Mood. 378.

by the assured in respect of the ship, by the peril insured against. Of this damage or detriment, the cost of repairing, minus the improvement resulting therefrom, is in general, but not always or necessarily, the true measure. The repair must be made with reasonable economy, and in a judicious manner (*x*); unless indeed it be a part of the disaster that the ship has been driven into at a place where economy and even honesty in repairing is unattainable by the assured or his servant the captain.

Loss of time in repairing. § 185.—No allowance is made for the ship's loss of time or employment whilst repairing, nor for the wages and maintenance of the crew necessarily retained at an intermediate port, nor for interest or commission on the shipowner's outlay. If indeed any of the crew are retained in order to work at the repair after the period when otherwise they would have been paid off, their wages whilst so retained must form part of the particular average.

Discounts. § 186.—The discounts allowed by tradesmen for prompt payment are of course to be deducted from the claim. The owner of the ship is not allowed in any way to derive a profit from the disaster, by making charges for his own services, or for those of persons in his permanent employ.

Repair beyond ship's value. § 187.—A ship may be repaired at an expense exceeding her value, either because the extent of damage is not foreseen at the outset, or from the mere caprice or whim of the shipowner, who, not being bound to abandon, may repair if he pleases. In such a case, however, the underwriter is not liable beyond the amount of his subscription, this being the limit of his liability for loss to the thing insured resulting from a single accident (*y*). But if, during the term insured, two distinct accidents occur, and are repaired separately, there is nothing to prevent the

(*x*) *Stewart* v. *Steele*, 5 Scott's N. R. 927.

(*y*) *Lohre* v. *Aitchison*, 4 Ap. Ca. 755.

underwriter from being liable, in the aggregate, to an amount exceeding the sum insured (*z*).

§ 188.—In repairing a ship, the cheapest or best way may sometimes be, to make an alteration or substitution, compensating, for example, broken timbers by extra knees or other fastenings. Where there is not honesty and skill, abuses of various kinds may no doubt result from such substitutions; a badly built ship may be, to a certain extent, reconstructed at the expense of the underwriters: therefore, these changes are to be watched with care. It cannot be doubted, however, that in many cases both parties are gainers from them. **Repair by substitution.**

Here it may be well to correct an erroneous notion that is sometimes troublesome in practice. A shipowner, in cases such as the above, is apt to fancy that he is entitled, in strict right, to have his ship replaced precisely as she was before, and that in consenting to the cheaper method of repairing he is making a concession, for which he ought in some way to be rewarded. If, for example, the ship had hemp rigging before, and being dismasted, and wire rope being both better and cheaper, wire rope is put in, he would claim from the insurer the difference between the cost of wire and hemp.

In all such cases, and indeed in every case of repair by substitution, two questions only are to be put: would a prudent owner uninsured have repaired the ship in this way, and is the ship any, and if so, how much, the worse in consequence? The first question, we may suppose, must be answered in the affirmative; otherwise, why repair in that way? As to the second, it is to be borne in mind that by such substituted repair the ship may be as strong and durable and as good a carrier, and therefore as valuable to the owner while he keeps her, and yet not so saleable, as being unsightly, or as arousing undeserved suspicion. In such a case, some compensation is due to

(*z*) *Le Cheminant* v. *Pearson*, 4 Taunt. 367, at 380; cited by Lord Blackburn, 4 Ap. Ca. 763.

the shipowner; for he is entitled to have a ship which shall be as fit either to keep or sell as she was before.

Under the head of substituted repairs may be placed the engaging or sending out of special agents, overlookers or the like, not absolutely necessary, but thought to be useful for keeping down expense. These should be dealt with on the same principle.

Extra expense for despatch. § 189.—Suppose that extra expense is incurred in order to obtain special despatch in repairing, as, for instance, by working at night, is this claimable from the underwriter? The underwriter objects that he never pays for loss of time, and therefore has no interest in such expenditure. The shipowner retorts, Your not paying for loss of time is an injustice which, at least, I should have the right to minimize. Here we come upon a real difficulty. The not paying for loss of time is a necessary consequence of an erroneous notion, which, however, is at present deeply rooted in the minds, not only of lawyers, but of shipowners themselves,—the notion, namely, that a ship, regarded as a mere structure of wood and iron, has a sort of value which is in some way separable from the value of her future earnings; so that damage done to a ship, and loss of the ship's employment for a time, are two distinct things, and the insurance of the ship covers the former only, and not the latter. So long as this notion is prevalent, it would be premature to discuss the question whether an underwriter on ship ought to pay for the ship's loss of employment whilst repairing. In the meantime, the practical solution of the smaller question here put seems to be, that the shipowner is entitled to repair his ship in that manner which a prudent man would employ if uninsured: and, therefore, if the extra payment for despatch is no more than he would reasonably incur for his own sake apart from insurance, the underwriter should be liable for it.

When repairs not effected. § 190.—We are lastly to consider the liability of an underwriter in case the repairs, or some portion of them,

are not effected at all. On principle, this circumstance ought not to affect the underwriter's liability, except in the case where that liability is merged in a liability for a total loss. If any part of the repairs have not been in fact made, and the ship is then totally lost under the same policy, it seems clear that the underwriter is only liable for the actual cost of what has been done, and the policy-value of the ship (*a*). It is otherwise if the total loss takes place subsequently to the termination of the risk. Thus, where a ship insured by a time policy suffered damage which was only partially repaired, and was then totally lost at sea after the policy had expired, it was decided that the underwriters were liable for the entire particular average, bringing in the estimated cost of the repairs not executed (*b*). The state of things at the termination of the adventure or term insured is to be looked to; and at that time the ship was so much the less valuable, as she stood in need of those repairs. The circumstance that a different set of underwriters paid the full agreed value of the ship, in respect of the total loss, was immaterial.

When ship sold unrepaired.

If the repairs are not effected by the assured, because he chooses to sell the ship unrepaired, the underwriter is none the less liable. In such a case the assured really sustains the loss, in obtaining a smaller price for his ship. The underwriter therefore must pay, on estimates of the cost of repairing, so much as he would have been liable for had the assured repaired,—at all events, up to the amount of loss actually resulting from the sale (*c*).

(*a*) *Livie* v. *Janson*, 12 East, 648, as explained in *Lidgett* v. *Secretan*, L. R. 6 C. P., at 620 and 625.

(*b*) *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.

(*c*) But not beyond his actual loss. Thus, where a ship valued in the policy at £3,700, was sold in her damaged state for Rs. 38,000 (£3,325), rather than spend Rs. 61,000 (£5,337), in repairing her, it was decided that the underwriters were to pay, not two-thirds of Rs. 61,000 (£3,558), but the assured's actual loss, that is to say, the difference between the *real* sound value of the ship, £4,000, and the sum (£3,325) she sold for in her damaged state, or £675. "Probably," says Cotton, L. J.,

Risk of removal for repair.

If, after the policy has expired, the ship has to be removed, for the purpose of repairing, from one dock or from one port to another, she moves at the risk of the assured, not of the underwriter; though, of course, at the underwriter's expense.

PARTICULAR AVERAGE ON FREIGHT.

Principle.

§ 191.—From the propositions, which in theory seem indisputable, that the only thing insured by a policy on freight is the freight to be earned under a contract subsisting at or before the inception of the risk, and that particular average must be a partial loss or damage of the thing insured, it must follow that a particular average on freight can only arise when some portion of the cargo originally contracted for is by sea-peril prevented from reaching its destination, so that the freight on it may be earned. If the ship is disabled, so that no part of the cargo can be carried to its destination by her, there may or may not be a *total* loss of freight, according as the cost of transport in another vessel is more or less than the original freight; but the cost of transport is in no case recoverable under the head of particular average (*d*). Nor, again, can a claim for particular average in any case arise from a delay before shipment such as puts an end to the adventure. The only ground for particular average on freight, then, is the disabling of a portion of the cargo for carriage to its destination (*e*). What constitutes such disabling has been considered in the chapter on total loss.

"the most accurate way of stating the measure of what, under such circumstances, he [the assured] is to recover, is that it will be the estimated cost of repairs less the usual deduction, *not exceeding the depreciation in value of the vessel as ascertained by the sale*" (p. 218). *Pitman* v. *Universal Mar. Ins. Co.*, 9 Q. B. D. 188.

(*d*) *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535; 2 C. P. 357.

(*e*) Such disabling may of course result from damage to the ship, no less than of the cargo; as in the case when a ship is so damaged

This being so, and the thing insured by a policy on freight being, as has been pointed out, the gross and not the net freight, the rule for adjusting a particular average on freight is simply this: it is first to be ascertained what proportion of the gross freight has been lost,—which is to be done by a comparison of the freight actually earned with that which would have been earned had there been no accident,—and the underwriter is then to pay the same proportion of the agreed or insurable value. **Rule for adjustment.**

§ 192.—In such a case, if other cargo is taken in to occupy the space left vacant by the disabled goods, it seems clear that the underwriters are entitled to the benefit of this substituted freight. Here, where the loss is only partial, and a portion of the original cargo is carried on, there can be no question of the voyage being the same; and the new freight could not have been earned but for the accident; and, therefore, on the principles applicable to every contract of indemnity, the underwriters are entitled to this as a species of salvage (*f*). The amount thus earned should be simply deducted from the claim computed as above; for the new freight is in no proper sense a portion of the thing included in the policy-valuation (*g*).

§ 193.—Should any portion of the freight have been prepaid, that portion, for the reason already given, must be deducted on both sides of the account, in order to deter- **Prepaid freight deducted on both sides.**

that she is unable to complete the voyage except in ballast-trim, carrying on a portion only of her cargo. There may likewise be a partial loss of freight, under a time-charter, from the disabling of a ship during a portion of the time; as when, by the terms of the charter, no freight is due while the ship is laid up under repair.

(*f*) *Ante*, § 141. See *Barber* v. *Fleming*, L. R. 5 Q. B., at 66; *Everth* v. *Smith*, 2 M. & S. 278; and *Barclay* v. *Stirling*, 5 M. & S. 6.

(*g*) Supposing the freight to be valued in the policy at a rate higher than the actual amount, as for instance, at 10 per cent. advance, then it clearly would not be right to add such a 10 per cent. to the new freight credited, otherwise this mode of adjustment would operate as a penalty and a discouragement to the captain to fill the ship up by taking in new freight.

mine what proportion or per-centage of the freight at risk has been lost by sea-peril (*h*).

Freight on shipowner's goods, or prepaid.

§ 194.—With regard to freight improperly so called, namely, prepaid freight and the freight on goods belonging to the shipowner, these interests, as has been already pointed out, are merely enhancements of the value of the cargo, and any claim for particular average on them should be adjusted in the same manner as if the insurance were on cargo. Since, however, this almost self-evident truth is at present by no means universally recognized, the safest course for the assured in these cases is to combine his insurance on his goods with that on his freight, as by insuring "cargo including freight," or "cargo including advance-freight," as the case may be.

The Memorandum.

§ 195.—Some very important questions affecting particular average spring from the insertion of the clause at the foot of the policy, first introduced in the year 1745, commonly called The Memorandum. It is as follows: *N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.*" There are variations of detail in many policies, and it is now very common to add the words "sunk or burnt" after "stranded."

"Corn," it has been decided, includes malt (*i*), peas, and beans (*k*), but not rice (*l*); and "salt" does not include

(*h*) *Ante*, § 139.

(*i*) *Moody* v. *Surridge*, Park, Ins., p. 245.

(*k*) *Mason* v. *Skurray*, *ib.*

(*l*) *Scott* v. *Bourdillon*, 2 B. & P. 213.

saltpetre (*m*). In other words, neither the scientific nor the popular sense, but that usual in the trade, is to determine such points.

"Unless general or the ship be stranded," has been construed to mean, "Except general, or unless the ship be stranded;" that is, underwriters are free from all average which is not general average, and they are liable for all average in case the ship be stranded,—no matter whether the stranding caused the damage or not (*n*). The damage may even have been discovered and repaired before the stranding takes place: a stranding, during the term insured, operates as a condition, and has the effect of effacing the remainder of the clause.

§ 196.—A ship is said to be "stranded," for the present purpose, when she is on the strand out of the common course of the voyage. *On* the strand implies a resting on it, not a mere striking and passing over. The *strand* is the ground or that which rests on the ground,—*e.g.* piles driven into it, or the wreck of some other stranded ship. And it is no stranding to take the ground in the precise place and manner intended in the ordinary course of the navigation. **Stranding, what is.**

As to how long the ship is to rest on the ground, in order to be stranded, it cannot be said that there is any rule, except that she must stop long enough to be hard and fast aground, so as to cease to be waterborne: if in motion, her way must be deadened. A stoppage long enough for a kedge to be carried out and the ship hove off, or for her engines to be reversed and the steamer backed off the shoal, would no doubt be enough. Baily suggests that she ought to be so far on the ground that her centre of gravity should be resting on it, so that she shall be in no sense afloat; but this is perhaps too severe; in practice it is taken to suffice that she is fixed on the ground and motionless, though only fixed by one end. But to strike

(*m*) *Journu* v. *Bourdieu*, Park, Ins. 245.

(*n*) *Burnett* v. *Kensington*, 7 T. R. 210.

and pass on, or to have her motion retarded by the ground, yet to be always moving, is not enough (*o*).

As for grounding in the ordinary course of navigation, as in a tidal river or harbour, or when placed alongside a dock wall to discharge cargo, though this itself is of course no stranding, yet a very little change of position, if resulting from an accident, will suffice to make it such. The breaking of a rope, or the mere stretching of it in a breeze, if it has the effect of tilting the vessel's bow off the bank she was lying on to a heap of stones or uneven ground not fit for lying on, has been held sufficient for the purpose (*p*). And even where the ship takes the ground in the place intended, yet if this intention be the result of an accident, so that the necessity for going there is out of the common course, as when a ship in distress runs into a tidal harbour for safety, there is little doubt this would be a stranding. Of course it is so, if the ship, being leaky, or on fire, or without anchors, is purposely run aground for her safety (*q*). In short, "if the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence" (*r*), this is a stranding (*s*).

(*o*) *McDougle* v. *Roy. Exch. Co.*, 4 Camp. 283.

(*p*) *Wells* v. *Hopwood*, 3 B. & Ad. 20; *Bishop* v. *Pentland*, 7 B. & Cr. 219. So, where a ship took the ground in a tidal harbour, at the place intended, but it proved that at the spot where she did so there was a hole, the existence of which was unknown, and in consequence the ship, instead of grounding fairly on her bilges, was pitched forward with a list, which hogged her and caused her to spring a leak, this was held to be a stranding; this being a mode of taking the ground which the parties could not have contemplated. *Letchford* v. *Oldham*, 5 Q. B. D. 538.

(*q*) *De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

(*r*) *Per* Lord Tenterden, in *Wells* v. *Hopwood*, 3 B. & Ad. 20, at 34.

(*s*) Sometimes, after "stranded," the words "sunk, burnt, or in collision" are added. "Burnt" means that the ship, not the goods in her (though the policy be on goods), must be burnt, so that the scorching of a beam, or the burning of a deck plank from upsetting a pan of coals, may be more to the purpose than the burning of the thing insured. The term "collision" is ambiguous, but regarded as a term of art in maritime commerce it is usually restricted to the

§ 197.—In order to mitigate the severity of the memorandum in excluding damage under five or three per cent., it is usual to insert what are called "average clauses," the effect of which is to subdivide the subject matter insured, for the purposes of this calculation, into smaller parcels, so as to give the assured a chance of recovery, in case this or that portion be seriously damaged whilst the bulk is sound. In insuring steamers, for instance, it is usual to value the hull and the machinery separately, with a clause, "average on each valuation as if separately insured." Sometimes the division is carried further, the "masts, spars, rigging, boats and materials," being valued separately from the hull. With merchandize the same end is attained by clauses such as "average payable on every ten bales of cotton, running landing numbers," or the like. Average clauses.

These clauses, being inserted for the benefit of the assured, are in no case to be used to his disadvantage; therefore the assured always has the option of claiming a loss which amounts to the requisite per-centage on the whole sum insured, notwithstanding that if broken up into smaller parcels, under the conditions of the average clause, some part of it might be excluded (*t*).

In distributing a cargo under series, regard must be had to the rule of law which treats each distinct com-

collision with another ship, and does not include running up against a dock wall, or striking upon ice-floes or ice-bergs. Whether it includes running against floating wreckage of what has been a ship, may be more doubtful: we are led to it by degrees: running into a ship without a watch, or with her watch asleep, certainly is a collision; surely it is not less so, if her crew have abandoned her, but she still retains the form of a ship, though dismasted, waterlogged, and innavigable: is it less so, if she breaks in two, and one half sinks, and we run into the other half? In a case not reported, Lord Coleridge gave it as his opinion that the word in the memorandum "means collision with another *ship*, and does not mean either dock, or sandbank, or floating wreck, or anything but the ordinary meaning, in my judgment, of collision." (*Richardson* v. *Burrows*, Q. B. 16 Dec. 1880.)

(*t*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

modity as a separate whole,—as a something which can be totally lost, notwithstanding that the remainder is saved. One such commodity must not be run into the same series with another; since, independently of any average clause, each distinct commodity is to be treated as if it were separately insured (*u*).

Tail series. From the principle that the whole thing insured must be divided into series, it follows that, unless the number of packages insured is divisible without remainder by the number which constitutes the series, there must be a remainder, or "tail series." The rule of practice, which seems to be fair enough, is that the underwriter is liable for the damage on this tail series should it amount to the required per-centage on the value of that series itself. If, for example, 105 bales of cotton are shipped, and the average clause is every ten bales, it suffices if the damage on the last five bales amounts to three per cent. on the value of those five.

Running landing numbers. With regard to the words "running landing numbers," these words are in practice treated as referring to the order in which the bales are entered in the dock landing book. A practice prevails in some ports to enter the sound packages at the beginning of the book and the damaged ones at the end, working forwards and backwards till they meet somewhere in the middle. This, of course, is very much against the underwriters; but where it is the custom of the port, they must submit to it.

(*u*) A similar precaution is of course to be observed if two distinct interests, or the properties of two separate persons, happen to be insured in the same policy.

CHAPTER VII.

OTHER LIABILITIES OF THE INSURER.

We have now, in the chapters on Total Loss and Particular Average, dealt with every kind of loss or damage directly suffered through the perils insured against by the thing insured. What remains, in order to complete the account of an insurer's liabilities, may be brought under two principal heads: either they are, like total loss and average, liabilities under that engagement which forms the main and proper scope of the contract, namely, the indemnifying of the assured against loss sustained in respect of the subject-matter insured, or they are accessory or supplemental liabilities which the insurer takes upon himself by some clause added to the policy. We begin with the former kind.

Here, from the nature of the case, the subject of enquiry may at once be narrowed thus: since we have to do only with some loss which has relation to the thing insured, and some loss other than a loss or damage actually and directly done to that thing itself, our enquiry must now have reference to some loss or damage which the thing insured might have, but has not sustained, and which has yet resulted in some pecuniary loss on the part of the assured. In other words, we have to do with the cost of measures taken to prevent or diminish some greater mischief.

Concerning this, there are in the policy two engagements or promises, to one or other of which the insurer's

liability must in each particular case of this kind be traced. These are, the "sue and labour clause" and the engagement to pay general average.

The Sue and Labour Clause.

The "sue and labour" clause.

§ 198.—This clause, which is in the body of the policy, and is one of great antiquity, is as follows: "*And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof* (a), *without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each according to the rate and quantity of his sum herein assured.*"

Is a distinct engagement by itself.

This clause is to be treated as an engagement distinct from the main body of the policy (b), and, therefore, not subject to the restrictions contained in the memorandum. The liability under it is not a liability for particular average (c). It is distinct from the rest of the policy in this further sense, that, although the underwriter's liability for a loss of the thing insured, resulting from a single casualty, is restricted to the amount of his subscription, yet he may be liable beyond that amount for such a loss when coupled with a claim under the sue and labour clause; as, when expense is incurred in an unsuccessful attempt to save a ship which nevertheless is totally lost (d).

General import.

The words "defence, safeguard, and recovery," imply the danger of some mischief greater, or supposed to be

(a) Sometimes, instead of "the said goods, etc.," the words used are "the subject-matter of this insurance." The meaning, as explained in § 63, is the same in either case.

(b) *Lohre* v. *Aitchison*, 2 Q. B. D., at 509; *Dixon* v. *Whitworth*, 4 C. P. D., at 378.

(c) *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535.

(d) *Lohre* v. *Aitchison*, in App., 3 Q. B. D. 558.

greater, than the cost of the means used to avert it. This is not necessarily a danger of total loss. Expense incurred in drying goods which have been wetted, in order to prevent the damage from growing worse, certainly comes within the terms of this clause (*e*). Nor are the words "sue, labour, and travel," to be used in too narrow a sense; it is all one whether the assured labours himself, or employs his servants to labour, or hires others to labour for him. Whether he employs his own barge to save or carry the goods, or hires a lighter or a forwarding ship for the purpose, each is alike a "labouring" within the clause (*e*).

Conditions:

Two conditions, however, are requisite to constitute a claim under the sue and labour clause: the apprehended mischief must be something for which the underwriters would have been liable, and the measure which gives rise to the expense claimed must be the act of the assured himself or of his agent or servant. If, for example, goods are insured "free of capture," it is clear that an expense incurred to prevent a capture could not be claimed under this clause; nor, if "against total loss only," an expense incurred merely to diminish damage or avert a loss other than total. The question always must be, whether, if the detriment escaped by means of timely care had come to a head for want of it, the loss would have fallen on the underwriters (*f*). And in the second place, this clause, which is inserted in order to encourage the assured to make timely efforts and incur needful expenses, applies only to efforts made and expenses authorised by him personally or by his servants or agents. Hence, where salvors pick up a ship derelict at sea, or as volunteers bring property into safety without being in any sense hired by an agent of the assured, the payment for salvage is not a claim under the sue and labour clause (*g*).

Must be, to avert a danger insured against.

Must be act of assured or his agent.

(*e*) *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535.

(*f*) See *Kidston* v. *The Empire Ins. Co.*, L. R. 1 C. P. at 543; 2 C. P. 357, at 364.

(*g*) *Aitchison* v. *Lohre*, 4 Ap. Ca. 755.

Must be, to avert a greater evil.

§ 199.—The fundamental principle, that a claim under this clause supposes some worse evil averted, enables us to distinguish with confidence between expenses which fall within the clause and some others which at first sight seem to come near it. Thus the cost of repairing a damaged ship is not—the cost of earning freight by a transhipment is—a claim under the sue and labour clause. Why? Because, in the latter case there is, while in the former there is not, a worse evil in the background. If the cargo is not transhipped, and that without delay, the original ship having been disabled, the owner of the goods may be entitled to resume possession, and the freight will be wholly lost to the assured (*h*). On the other hand, the

(*h*) This distinction, it is true, is open to the theoretical objection that such a total loss would not be the necessary or natural consequence of the perils insured against, but merely of the negligence of the assured, and therefore might not be recoverable from the underwriter; whence it might be argued that there is no real distinction between the two cases, and that the cost of forwarding is really only the measure of the detriment done to the freight, precisely as the cost of repairing is the measure of the damage done to the ship. The answer is, however, that such a construction, applied consistently, would leave the sue and labour clause absolutely without a meaning, which is not allowable. For, if the basis of any argument is to be, that the underwriter must in no case be liable for more than what the loss would have been had the assured done his utmost to prevent or diminish it, and that the underwriter is in no case to pay for an expense incurred by suing and labouring, unless it can be shown that he, the underwriter, has been a gainer through its having been incurred, this is what could not be shown in any case,—for if the expense had not been incurred, the underwriter would still be entitled to insist on a settlement as if it had been. Take, for example, the case decided in *Kidston* v. *The Empire Ins. Co.*: an expense of, suppose, 200*l.* is incurred in forwarding a cargo, by means of which a freight of 500*l.* is saved. When this 200*l.* is claimed from the insurer, whose policy is free of particular average, he might answer: This expense was incurred, no doubt, but not for my benefit; since, if it had not been incurred, I should not have been liable for your loss of 500*l.*, because you lost it through your own folly. And so of every other conceivable claim under the sue and labour clause. But then the assured has the unanswerable retort: What did you mean, then, by putting this clause into my policy? The clause purports to be, and is, a privilege, or bonus, intended to encourage personal exertions by rewarding the assured for doing that which certainly in some sense he was bound

cost of repairing the ship is the measure of the damage done to the ship by the accident. If the expense in question were not incurred, the damaged ship would still be there, repairable whenever the assured might please; so that the assured could not properly allege that in repairing his ship he was labouring on its "defence, safeguard, or recovery." The same distinction is illustrated by a case in which a cargo of rye, being heated through sea-damage, and in danger of becoming totally worthless if left in the confined hold of the ship, was landed and placed in warehouses, in order to separate the damaged portion from the sound, and dry and cool what was heated; after which the sound rye was kept in the warehouse for a further period, until the ship was repaired and ready to take it on board. The rye was insured with the warranty "free of particular average." In this case it was decided that the underwriters were liable, under the sue and labour clause, for so much of the expense of landing and warehousing the rye as was necessary for separating the sound portion from the damaged,—in other words, for averting the danger of total loss,—but that, so soon as this end had been attained, the subsequent hire of the warehouse, being incurred merely as the result of an accident not exposing the rye to any danger of total loss, must fall on the assured (*i*).

Is the master the agent of the cargo-owner?

§ 200.—A question, of some practical importance, not yet determined by the Courts, is, whether the master of the ship is to be considered, for the purposes of the sue and labour clause, the servant or agent of the owner of the cargo, in incurring expenses either exclusively for the benefit of the cargo, or for its benefit or preservation conjointly with that of the ship. Some power of agency on behalf of the cargo, under circumstances of unforeseen necessity, when there is no time or opportunity for con-

to do. By this both parties are gainers, but principally the underwriters.

(*i*) *Meyer* v. *Ralli*, 1 C. P. D. 358.

sulting the owner, the master of a ship undoubtedly has. Whether this extends so far as to confer on his actions that privilege, in some sense personal to the assured, which is given by the clause in question, seems to be a doubtful point. There are difficulties on either view. If we may take it that the master is for this purpose the agent of the cargo-owner, then the underwriter's liability to pay general average is almost completely merged in his liability under the sue and labour clause. If the master incurs expense in drying the cargo at a port of refuge to prevent its total destruction or greater damage, if he engages salvors or tugs to avoid some danger by which the cargo together with the ship is threatened, or if for the same purpose he throws cargo overboard, slips from an anchor, cuts away a mast, or bears up for a port of refuge, all this, so far as the cargo's share is concerned, is suing and labouring for its defence, safeguard, or recovery. The cargo's share of general average, therefore, is on this view recoverable under the head of the sue and labour clause, with one exception only, namely, when the general average consists of salvage paid to persons not engaged by the master, but who have come on board as volunteers, or of sacrifices made for the common safety by such persons, supposing the master to be absent or the ship to be for any reason not under the command of the master or any deputy of his authorised by the owners (*j*). To this there

(*j*) Another way of putting the argument, to prove that general average is a liability under the sue and labour clause, as being virtually the act of the assured, is this:— The right to general average contribution is often said to be founded on an implied contract, supposed to be entered into at the moment of danger between the owner of the ship and the several owners of cargo on board, whereby those whose property is sacrificed consent to give it, and those whose property is saved consent eventually to contribute towards replacing what is thus given. Originally, when the merchants sailed with their goods, such contracts were actually made; and we have in some of the older sea-laws directions as to the very formula of words to be used in making them. (See, for example, a curious instance in the Laws of Oleron, cited in my book on "General Average," p. 267.) Later, this authority was delegated, first to a supercargo on behalf of all the

is perhaps no serious objection, except that it seems novel and somewhat needlessly complicated. On the other view, if the master is not to be regarded as the servant or agent of the cargo-owner, he certainly is the servant of the shipowner. If, therefore, he incurs expense about the defence, safeguard, or recovery of the ship, is not the shipowner entitled, under the terms of the sue and labour clause, to recover the whole of this expenditure, in the first instance, from his underwriters on ship and freight, leaving them to recover any contribution that may be due from the cargo? Such is, it appears, the law in the United States; and in a recent case, Lindley, J., expressed a strong opinion in favour of this view (*k*). This, however, would be a still greater novelty in our practice. At present, the question can only be noted as one that requires further discussion in the Courts.

Mode of calculating claim on policy.

§ 201.—Another question, which can hardly be considered as finally settled, has reference to the mode of calculating the claim under the sue and labour clause. "To the charges whereof," the clause runs, "we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured." This does not define what is to be the gross contributing capital. This question may come in two, or rather three, forms: either the "charges" here referred to may be charges for saving the thing insured, and that only, or, in saving it, they may procure the safety of something else,—and this either a different thing, or an accretion on the thing insured, such as a profit not anticipated at the time of insuring. In the first of these three cases, it seems clear on principle

merchants,—an institution introduced by the Venetians,—and subsequently to the master of the ship. Thus, not merely as a matter of theory or speculation based on the necessity of the case, but historically and in fact, the master of the ship has been clothed with the character of agent for the owner of the cargo. (See *Schmidt* v. *Royal Mail S. S. Co.*, 45 L. J. (Q. B.) 646; *Crooks* v. *Allan*, 5 Q. B. D. 38.)

(*k*) *Whitworth* v. *Dixon*, 4 C. P. D., at 378.

that the basis of the contribution must be, the value in the policy; for here there are only two parties concerned, the assured and the underwriter, and, as between them, it is not open to either to say that the real value of the thing insured is greater or less than the agreed valuation (*l*). In the second case, where some other thing besides that insured is saved in saving the latter, as, for example, where a ship is saved from peril by a tug, which in the same act saves the cargo, it would seem reasonable —apart from the doubt suggested in § 200—to hold that the other thing saved should come in as a contributor, and so the share of each individual underwriter be diminished (*m*). With regard to the third case, that in which an uninsured profit is likewise saved by the measures which save the goods insured, there is more doubt; but in practice, hitherto, the same rule has been applied to this as to the second case, that is, the profit has been brought in as a contributor. This is plainly equitable, and the only question is, whether it is consistent with the language of the clause. The clause appears to leave the matter absolutely undetermined. The value in the policy, as has been seen, represents the expectation such as it was at the time of insuring. Both parties know that there is a chance the market may go higher before the goods can arrive: thus there is, to the knowledge of both, an uninsured possible accretion to the goods. If the goods are saved from perishing, this accretion, if it exists, must be saved too; and there seems to be no reason why the underwriter, who has received no premium for it, should pay for saving it, nor yet why it should be saved gratis (*n*).

(*l*) *North of England Ins. Ass. Co.* v. *Armstrong*, L. R. 5 Q. B. 244.

(*m*) See *Kemp* v. *Halliday*, L. R. 1 Q. B. 520.

(*n*) The question dealt with in his paragraph has come under judicial consideration in two recent cases. In *Lohre* v. *Aitchison* (2 Q. B. D. 501), a ship, after having been saved from the risk of total loss at a certain expense, was repaired at so great a cost that the particular average payable by the

§ 202.—The absolute undertaking in the sue and labour clause, to contribute towards the charges incurred by the assured, must be understood without prejudice to the implied condition that these charges shall have been reasonably and prudently incurred. If an unnecessarily expensive method of saving the property has unwisely been adopted, the underwriters will be liable, not for the amount actually incurred, but for so much as it would have cost to have saved the property in a judicious manner. For this latter amount, however, they are liable, notwithstanding that the expense has not in fact been incurred in this form (*o*). **Action taken must be judicious.**

General Average.

§ 203.—General average is a loss arising from a sacrifice purposely made for the preservation of the ship and **Definition.**

insurers reached the limit of 100 per cent.; whereupon it was first decided by the Court of Queen's Bench that the underwriters, having in fact derived no benefit from the expense incurred in saving the ship, were not liable to contribute anything towards that item; but in the Court of Appeal (3 Q. B. D. 558) this judgment was reversed, on the ground that this expense was claimable under the sue and labour clause, and formed a liability apart and distinct from the liability for particular average, and that the question was, not whether the expense had proved beneficial to the insurers, but whether it was incurred for the defence, safeguard or recovery of the thing insured. The case was carried to the House of Lords (4 Ap. Ca. 755), and there, unfortunately, went off on another ground. In *Dixon* v. *Whitworth* (4 C. P. D. 371), Cleopatra's Needle was insured for 3000*l.*, against total loss only, on a valuation of 4000*l.* Having broken adrift from its tug during a gale in the Bay of Biscay, the Needle was in danger of total loss, from which it was rescued by salvors, to whom the Admiralty Division awarded a salvage of 2000*l.*, valuing the Needle at 25,000*l.* The question came before the Common Pleas Division, whether the underwriters were liable for three-fourths or three twenty-fifths of this sum. Lindley, J., who tried the case, pronounced in favour of the former fraction. This decision also was appealed against (49 L. J. (C. P.) 408), and, like the other, went off on a different ground; namely, that the salvors not being the servants of the assured, there was no liability at all under the sue and labour clause.

(*o*) *Lee* v. *Southern Ins. Co.*, L. R. 5 C. P. 597.

all on board from danger,—whether the sacrifice consists of throwing overboard cargo, destroying this or that portion of the ship, or adopting measures which involve extraordinary expenditure,—which sacrifice, being made on behalf of all, must be replaced by the contribution of all. Thus it appears that general average has properly nothing whatever to do with marine insurance, this contribution being a right which exists independently of it, and indeed which existed many centuries before insurance was invented. Its connection with the law of insurance is restricted to a single point, viz., the liability of the insurer to pay back that which his assured has paid as his share.

The two stages.

The general average itself, or loss resulting from the sacrifice (*p*), must be regarded as having two stages. Before distribution, it is either a loss of this or that portion of the ship or cargo, given for the rest, or the expenditure of so much money, paid for all by some one person, usually the owner of the ship. After distribution, it is a rateable assessment of so much per cent. on the value of the entire ship and cargo.

Direct liability of underwriters.

Now the loss of property as it exists before distribution,—whether it be of cargo jettisoned or otherwise sacrificed, or of a mast cut away, or the like,—is recoverable by the owner of the thing sacrificed from his underwriters, just as if it had been destroyed by the violence of the winds and waves (*q*). If the whole of some one commodity insured in one policy is thus destroyed, the claim is for total loss.

(*p*) The term "general average" is often used loosely as applicable either to the sacrifice itself, the loss which it occasions, or the contribution by which that loss is equalized. My reason for thinking that the term most properly applies to the *loss*, may be gathered from the explanation of the word "average" given in note (*a*) to § 160. Accepting the sense of the Ordonnance of Louis XIV. as that which accompanied the word on its introduction into English law, we find that an average is always a loss or expense, and that this was from the period referred to always divided under two heads, simple or particular average, and common, gross, or general average.

(*q*) *Dickenson* v. *Jardine*, L. R. 3 C. P. 639.

If a part only is sacrificed, the claim is in practice treated as particular average. Whether this latter is strictly right, or whether such a loss can be for this purpose, while still in the stage preceding the distribution as general average, treated as *not particular* average, is a question which has not yet come before the Courts. This question must be reserved (see § 207) until we have set forth the precise position of the underwriters with respect to general average in the second stage, that is, after distribution.

The lien for general average.

§ 204.—As amongst the several owners of property which has been rescued from danger by a sacrifice of this kind, the obligation on each to pay his share of the general contribution is enforced, in the strictest manner practicable, by the laws of every maritime country. In most countries, a mutual right of *lien* is given, in virtue of which neither can the consignees obtain delivery of their goods until they have deposited, or given security for, their respective shares, nor is the ship allowed to quit the port until the share due from it to the cargo has been paid. In England, great progress has been made in this direction. The power of stopping the cargo until security is given for the cargo's share is now complete. With regard to the ship, any ship not owned in England or Wales may be stopped for general average by Admiralty process; and, with regard even to English-owned ships, it is now settled, first that the owner is bound, under liability to an action at law, to take from the several consignees of cargo delivered an adequate security for the claims of those whose cargo has been sacrificed, as well as to be personally liable for the share falling on the ship and freight (r); and secondly, under the County Court Admiralty Acts, that the ship may be arrested for claims not exceeding £300 springing out of the contract of affreightment,—a right which seems plainly to carry the arrest of the ship

(r) *Crooks* v. *Allan*, 5 Q. B. D. 38.

for jettison or other sacrifices of cargo (*s*). Practically, therefore, it may be said that the right of contribution for general average is secured all round by a *lien*.

Principle of the insurer's liability.

Since, then, this liability to general average contribution constitutes a loss or expense, resulting from the perils insured against, and inseparably annexed to the thing insured, so that possession of it cannot be obtained without submitting to the payment, it seems to follow as a matter of course, even without any express reference to it in the policy, that the underwriter must be liable for it. But besides this, the policy contains the words, "free of average, *unless general*, under three per cent." The exception of general average from this clause is held in the Courts to imply that the underwriter "expressly, absolutely, and universally undertakes to pay general average" (*t*).

Liability for foreign general average.

§ 205.—As amongst the several owners of the property saved by a sacrifice, the liability to general average is determined by the law of the place at which the common adventure terminates; that is to say, the law of the port of destination when the voyage is completed, and, when it is not, the law of the place where the voyage is broken up and the ship and cargo part company (*u*). The underwriter, whose part it is simply to indemnify the assured for what he has been obliged to pay through the perils insured against, ought on principle to be universally subject to the same law. The decisions of our Courts go a long way towards establishing that he is so. Whatever the assured has been obliged to pay to a third party, as his contribution towards general average, it is now settled

(*s*) *Alina*, 5 Ex. D. 227.

(*t*) *Per* Lord Campbell, in *Hall* v. *Janson*, 4 E. & B. 500. This undertaking, however, must of course be understood with reference to the perils insured against. For example, under a policy "free of capture," the underwriter would certainly not be liable for general average, if the sacrifice which gave rise to it had been made merely in order to avoid the risk of capture.

(*u*) *Fletcher* v. *Alexander*, L. R. 3 C. P. 375; and see *Hill* v. *Wilson*, 4 C. P. D. 329.

that he can recover from his underwriter (x). The average, if rightly adjusted according to the right place for adjusting it, is as obligatory on the insurer as on the assured who has paid money under it; and it is beside the question to enquire whether the average has been rightly adjusted according to the law of England. The only point still undetermined is, whether a foreign adjustment is equally obligatory on the insurer of one who, instead of paying, has received under it a sum to which by English law he would not be entitled. It is commonly supposed, for example,—though the point may be open for argument (y),—that by English law a shipowner is not entitled to claim as general average the wages and provisions of his crew during detention in a port of refuge; an item which the laws of most foreign countries bring in as part of the loss. Suppose a general average to be incurred on a voyage to a port in the United States, where this loss is treated as general average, can a shipowner, who has recovered the cargo's share of the item in question under an adjustment drawn up at the port of destination, then proceed to claim the ship's share from his underwriters? It is conceived that he can: for the underwriter has engaged to pay general average, and this word general average must be construed in the same sense for all policies whether on ship or cargo, and that sense certainly is not "general average as understood by the law of England,"—since English law is not necessarily the basis when it is a question of money paid,—and can only be "general average as rightly adjusted," which again can only be, according to the law of the right place for adjusting it (z). That the point is not free from doubt, and yet that underwriters as well as shipowners generally recognise that this is what they at least *ought* to intend,

(x) *Harris* v. *Scaramanga*, L. R. 7 C. P. 481.

(y) See *Atwood* v. *Sellar*, 5 Q. B. D. 286.

(z) *Mavro* v. *The Ocean Mar. Ins. Co.*, L. R. 9 C. P. 595, though not conclusive, certainly points in this direction.

may be inferred from the fact that it is now usual to insert in policies on ships the clause "general average payable according to foreign adjustment if required."

How, when contributing value is greater than policy-value? § 206.—The contribution to general average is assessed on the net market value of the cargo, whenever the voyage is completed, at the port of destination; in other words, on a value which is greater than the value in the policy, assuming the latter to have been fixed on the true basis as pointed out in § 30, whenever there has been a rise in the market subsequently to the time of shipment. For the reasons assigned in § 201, it is conceived that in such a case there ought to be a proportionate reduction in the sum paid by the underwriter; this being the case of an uninsured profit, saved by the sacrifice, and which therefore ought to contribute, but not at the expense of the underwriter, who has received no premium on it. The same rule in this matter, it is conceived, ought to apply to general average as to claims under the sue and labour clause (§ 201); more especially as it must often be difficult, if not impossible, to determine under which of the two heads the assured is entitled to claim.

Direct liability for goods sacrificed: is this particular average? § 207.—I return now to the question reserved in § 203 for further consideration, viz., whether an undistributed loss by a sacrifice of cargo or ship's materials, claimed directly from the underwriter of the thing sacrificed, is claimable *as particular average.* This appears to me an extremely difficult question. In the general practice of adjusters, it is at present so treated: the question is, whether this practice is right.

In defence of it, it may be argued that the loss or damage of the thing insured must, as between assured and assurer, be either total or partial; and that every partial loss of the thing insured must, as between them, be a particular average (*a*). As between these parties, the words "unless general" in the memorandum are totally unmeaning, unless they are understood to denote the payment

(*a*) *Ralli* v. *Janson*, 6 E. & B. 422.

which the assured may be called on to make as a contribution, or general average after distribution. The engagement to pay general average, implied in these words, must consequently be understood in this sense only.

To this it may be answered that there is nothing unintelligible in supposing that the above clause in the memorandum refers to general average in its proper sense (§ 203, n. (*p*)), namely, the sense of the Ordonnance, as *loss* caused by a sacrifice for the good of all; in which case the purport of the clause in question would be, that the underwriter, not unnaturally desiring to encourage sacrifices which prevent a total loss, does so by drawing a distinction between these and accidental losses, and promising to pay for the former without restriction as to amount (*b*). A further reason for taking this view is, that we thereby get rid of a complication springing from the "sue and labour clause." For, supposing for argument's sake that a merchant whose goods have been jettisoned cannot claim their value directly from his insurer *as* general average, the question would still remain whether he could not claim it under the sue and labour clause. In § 200 reasons were given for holding it at least probable that the act of jettison, when a portion only of the goods insured are thrown overboard, may be treated as a suing and labouring by the assured or his agent for the preservation of the remainder; in which case, since it is all one whether money is spent or money's worth thrown away, the loss by jettison may represent those "charges thereof" which the insurer has absolutely engaged to pay. But, if claimable under the sue and labour clause, it clearly is *not* particular average.

I must leave the arguments on either side to the judgment of the reader, confessing myself on the whole to

(*b*) See also, in support of this view, the definition of particular average found by the jury in *Kidston* v. *Empire Mar. Ins. Co.*, *ante*, § 160, n. (*a*).

incline towards those reasons which I have set forth last in order.

CLAUSES RELATING TO COLLISION.

This volume may now be brought to a close, its review of the ordinary or old Lloyd's policy having been completed. Under the head of insurable interest we have dealt with the subject-matter of the contract; then considered how to insure, with the penalties for doing this badly: next, examined the indemnity given by insurance, first as to quality, then as to quantity, for a total or a partial loss of the thing insured, or for the cost of avoiding a worse disaster. By way of *annexe,* however, a few words must be added as to some accessory or supplemental liabilities of the underwriter: and first, for clauses relating to Collision.

Collision, which of late years has unquestionably been greatly on the increase, may involve a shipowner in heavy and various liabilities, to guard against which in a satisfactory manner by means of insurance has been and still is the subject of experiment. I will here briefly set forth, first the precise nature of these liabilities, and then some of the methods adopted thus to guard against them.

§ 208.—In addition to the damage done to the ship itself by the collision, the shipowner may, whenever the collision has been occasioned wholly or in part by the fault of the master or crew of his own ship, be liable to pay for damage done to the other ship or her cargo, or to the cargo of his own ship, or to passengers' effects on board either ship, or for loss of life or personal injury to the passengers on board either vessel, and to the crew of the other ship (*c*). If his own ship has been solely in fault, he is liable for the whole; if both are in fault,

(*c*) As to the crew of his own ship, the principle of "common employment" would protect a shipowner, the Employers' Liability Act passed last session not applying to ships.

the rule now is that the owner of each ship must pay one-half of the damage done by the collision to the other, its cargo, and presumably—though this precise point has not yet been expressly determined—the lives and persons of those on board (*d*). These liabilities are again complicated by the fact, that by Act of Parliament no owner of any ship, whether British or foreign, is liable in the aggregate for such damages beyond the amount of 15*l.* per ton in respect of loss of life and property together, nor beyond 8*l.* per ton in respect of loss of property alone; such tonnage to be, the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room (*e*). A deduction is allowed, however, for crew space, both for sailing ships and steamers.

§ 209.—The manner in which these rules operate, when both ships are in fault, is as follows:—The owner of ship A. has to pay to the several claimants, as well as those interested in ship B., her cargo, and the lives on board, as to the owners of cargo and claimants in respect of life on board his own ship, either one-half of their respective claims, or an aggregate sum, representing either 8*l.* or 15*l.* per ton, according as the question of life or personal injury comes or does not come into play (*f*). On the other hand the owner of ship A. has to receive from the owner of ship B. a sum computed *mutatis mutandis* on the same principle in respect of damage the former has received. When the amount payable at 8*l.* or 15*l.* per ton is less than the aggregate claims upon it, a machinery is provided, which may be briefly described under the

(*d*) This paying of one-half each is the practical result of the old Admiralty rule, that the damages of both vessels are to be put together, and divided equally between both.

(*e*) Shipowners now frequently insert clauses in their bills of lading to exempt themselves from some of these liabilities.

(*f*) Or, as the case may be, he may be liable to satisfy the claims for loss of life and personal injury by payment of one-half, and may then pay into Court 8*l.* per ton in respect of the loss of property.

name of a "suit for limitation of liability," by means of which each of the claimants on this fund is to receive his rateable proportion. It is to be borne in mind that the suit of ship A. against B. is to be treated throughout, for the purpose of making this money settlement, not as an entirely distinct suit from that of B. against A.: but for the balance only, *i.e.*, the excess of A.'s half-damages over those o B., the two suits being supposed to be fused in one. This difference is material only in case the statutory limitation of liability comes into play (*g*).

§ 210.—In addition to this liability for half damages as one of two wrongdoers, the shipowner presumably has a further liability as carrier towards the owner of cargo in his own ship, and to the persons on board it or their representatives in case of loss of life or personal injury; since as between the owner of the ship and these persons the liability is not for one-half but for the whole damage (*h*). Supposing, then, that the aggregate claims on him under the collision suit, including of course the half damage sustained by the cargo in his own ship, do not absorb the 8*l.* per ton, and supposing further that the cargo-owner is unable to recover in full from the owner of the other ship the remaining half of his damages, it must follow that he may require his own shipowner to make up the deficiency, that is to say, still keeping within the limit of 8*l.* per ton. And in the same way with claims for loss of life and personal injury by those in his own ship, up to the limit of 15*l.* per ton.

§ 211.—The limit of 8*l.* or 15*l.* per ton applies to the principal sum or damages. In addition, the shipowner is liable to pay interest, usually at the rate of four per cent.,

(*g*) *The Stoomvaart Maatschappy* v. *Peninsular and Oriental Steam Nav. Co.*, 4 Aspinall's Maritime Law Ca. 567; overruling *Chapman* v. *Roy. Netherlands Steam Nav. Co.*, 4 P. D. 157.

(*h*) I am not aware that this precise point has been before the Courts, but it seems to follow necessarily from admitted principles of law: see *Lloyd* v. *Screw Colliery Co.*, 33 L. J. (Exch.) 269, and *Grill* v. *Same*, L. R. 1 C. P. 600, 3 C. P. 476.

on this amount, from the date of collision to the date of payment. He has likewise to pay costs, which may be divided under three heads, those of the main action, of the registrar and merchants for determining the amount of damages, and those of the suit for limitation of damages.

Such being the liabilities of the shipowner, we are in the next place to consider how he is to be protected against them by insurance. This is usually done, partly by means of a clause now universally inserted in policies on the ship, called the "Collision Clause," and partly by means of associations amongst shipowners for mutual indemnity against these and other similar liabilities.

Collision clauses.

§ 212.—The principle of the Collision Clause is, that the underwriters will relieve the assured of three-fourths of his liability to pay damages for loss of property in and on board the other ship. He is to take one-fourth himself, as a check upon carelessness in the choice of servants: and his liability in respect of loss of life and personal injury, as well as for damage to the cargo in his own ship, are left untouched. There is a difference of detail in the clauses used by different insurance companies and underwriters, which should not be overlooked by the assured. Sometimes nothing is said about costs—a serious omission (*i*); sometimes it is stipulated that the basis of amount claimable shall in no case exceed 8*l.* per ton; thus at once excluding costs and interest. Even where costs are provided for in the clause, underwriters may not be liable, unless it is expressly so stipulated, for the costs of the suit for limitation of damages, since the collision clause is frequently so worded as to make it appear that the underwriters cannot be interested in this suit. In short, there is an appreciable difference in the value of different collision clauses (*k*).

(*i*) Unless costs are specified in the clause, the underwriters are not liable for them, though the action be defended with their written consent. (*Xenos* v. *Fox*, L. R. 3 C. P. 630; 4 C. P. 665.)

(*k*) One point to which some collision clauses fail to give the indemnity expected is this: when the suit between the two ships

The Collision Clause is a distinct engagement apart from the rest of the policy. The liability under it is not particular average, consequently is not subject to the limit of three per cent. The ordinary policy-stamp covers this clause as well.

Indemnity associations.

§ 213.—The principle of the undertaking on the part of Indemnity Associations is, that the Association engages to supply what is defective in the compensation given by the Collision Clause, on the understanding, however, that the assured on his part shall do what in him lies to obtain the full benefits of that clause, or shall settle with his co-associates as if he had done so; in other words, that his settlement with the Association shall be on the basis of his having fully insured the ship with the usual Collision Clause. This principle could, of course, be more simply and satisfactorily carried out if there were some agreed standard as *the usual* Collision Clause. This is a point towards which things are evidently tending.

This state of things, by which one portion of these liabilities is taken as a kind of accessory to a policy on ship, and the remainder by an Association of ship-owners, has evidently grown up in a gradual way, and presents a somewhat clumsy appearance. Quite recently, the project has been suggested of a fundamental change, whereby the "collision liabilities," either with or without "collision damage" or damage done to the ship itself by a collision, shall be made a distinct subject of insurance, by a policy effected with underwriters in the usual manner, but taking this risk and nothing else. One advantage of this method would be, that it would get rid of complications arising out of the ship's value, since the amount insurable would in every case be 8*l.* or 15*l.* per ton, according as the risk of life were included or not.

takes place abroad, in a country where the limitation of 8*l.* per ton is not in force, the shipowner may be liable up to the full value of the ship, while he may only be entitled to recover under his collision clause up to the amount of 8*l.* per ton.

The Foreign General Average Clause.

§ 214.—A clause continues to be inserted in policies, which at the time when it was introduced was one of considerable importance, but which the development of our law has now rendered almost immaterial,—namely, "general average payable according to foreign adjustment, if required by the assured." We have seen that, so far at least as general average consists of a payment to third parties, the underwriter, without any such clause, is liable for general average, if correctly adjusted according to the law of the foreign port at which the voyage terminates. The clause in question was originally intended merely to remove any doubt on this point; but now that this doubt is at an end, the continued retention of this clause has an effect which probably was never contemplated by those who inserted it. Since every clause in a contract must if possible be so construed as to mean something, the Courts have construed this clause to mean that when a foreign adjustment, drawn up at the proper place, has been acted on by the parties, the underwriters are bound by it whether it be right or wrong. If right, they are bound by it without a clause; the clause can only mean, then, to bind them by it though it be wrong (*l*). Another effect of this clause is that, where the general average consists of damage sustained by the assured's own goods, which damage by English law would be particular average, the underwriters on a policy free of particular average would be liable for it, on the ground that it has been treated in the foreign adjustment as general average (*m*). **Effect of this clause.**

A recent modification of this clause, viz., "to pay general average according to foreign adjustment *or the York-Antwerp Rules*, if in conformity with the contract of **York-Antwerp clause.**

(*l*) Per Bovill, C. J., in *Harris* v. *Scaramanga*, L. R. 7 C. P. 481, at 489.

(*m*) *Mavro* v. *Ocean Mar. Ins. Co.*, L. R. 9 C. P. 595; 10 C. P. 414.

affreightment," is more important. The York-Antwerp Rules constitute a sort of international code of general average, not as yet obligatory, but intended as a first step towards uniformity in the adjustment of general average throughout all maritime countries. Our own law has of late years so rapidly approximated itself towards these rules, that it is probable before long the rules themselves will be only important as bearing on adjustments abroad: but, at least until that is the case, the clause will continue to be necessary for the protection of the assured in English policies.

CHAPTER VIII.

SUBROGATION.

THUS far, the insurer has been treated as paying: let us close the subject by considering him as engaged in recouping his losses, by placing himself in the position of his assured, and in his name making claims upon third parties.

§ 215.—When a total loss has been paid, there passes to the insurer not only what remains of the ship in a material form, but likewise all rights incident to the property, of whatever kind. When a loss of any kind, total or partial, has been paid, the insurer so far stands in the place of the assured, that he is entitled to whatever compensation for the loss the assured may be able to recover from any third party. This right is called the right of subrogation.

The nature, or at least the extent, of this right, has not yet in all respects been clearly settled by decisions of the Courts. It will be convenient to begin by setting forth the more important decisions, and afterwards pointing out the questions, some of them undecided questions, which most frequently arise in practice.

The earliest of these decisions is in 1748, and I give the report of it almost verbatim, as follows:—

The king having granted general letters of reprisal on the Spaniards for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only, although they

were already satisfied for their loss by the insurers, who thereupon brought the present bill. Lord Chancellor Hardwicke was of opinion that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid; although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them (*a*).

The next case was in 1782, and was in the Court of King's Bench.

A house having been demolished in the riots of 1780, the Fire Office, having paid the loss, brought an action in the name and with the consent of the owner of the house, against the hundred, under the Riot Act. It was objected that the hundred was only liable to the owner, and he could not be entitled to a double indemnity. But the Court were unanimous that the hundred was liable. Lord Mansfield said:—"The question comes to this, can the owner of the house, having insured it, come against the hundred under this act? Who is first liable? If the hundred, it makes no difference: if the insurer, then it is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the assured. In every abandonment it is so. The insurer uses the name of the insured." Buller, J., said: "The principle is, that the insurer and insured are one, and in that light, paying before or after can make no difference" (*b*).

In *Yates* v. *White* (*c*), where the question was, what amount could be recovered by the owner of a ship

(*a*) *Randal* v. *Cockran*, 1 Ves. Sen. 97.

(*b*) *Mason* v. *Sainsbury*, 3 Doug. 61.

(*c*) 4 Bing. N. C. 272.

damaged in collision from the owners of the ship in fault, it was contended that a deduction should be made from the cost of repairs for so much as had been paid by the insurers; but this was negatived on the authority of the two cases above cited.

Where a ship had been totally lost in a collision, and the insurers had paid the full policy-value, 6,000*l.*, and then brought an action in the name of the assured against the wrong-doer, and succeeded, and would have recovered the ship's actual value, which was 9,000*l.*, had they not been restricted by statute to 8*l.* per ton, or 5,684*l.*, it was held that the insurers were entitled to the whole of this 5,684*l.*, and would have been, it seems, entitled to the whole 9,000*l.*, had so much been recovered. The owner claimed to retain a share in respect of the difference between 9,000*l.* and 6,000*l.*, but this was negatived. "I take it to be clearly established," said Lord Cockburn, "in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it. . . . . . And then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to that which is the representative of the ship in the shape of damages to be paid by the owners of the vessel which caused the collision" (*d*).

The steamer *Dunluce Castle* was sunk in a collision by the fault of the steamer *Fitzmaurice*. Both steamers belonged to the same owner, who paid into Court a sum of 3,590*l.*, being at the rate of 8*l.* per ton on the tonnage of the *Fitzmaurice*. The underwriters on the *Dunluce Castle*, having paid a total loss, claimed to rank as creditors upon the fund of 3,590*l.*, in respect of the sum so

(*d*) *North of England Ins. Ass.* v. *Armstrong*, L. R. 5 Q. B. 244, at 248. See also *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.

paid, together with the owners of the cargo, and the seamen who had lost their effects in the collision: but this was negatived, on the ground that the insurers, being one with their assured for this purpose, could have no greater or other right than the assured himself.

Cairns, L.C., said:—"I know of no foundation for the right of underwriters, except the well-known principle of law that, where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrong-doer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured; and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all" (*e*).

Lord Blackburn, in the same case, said that, while after a *total* loss the property in the thing insured, and all rights incident to the property, passed to the insurers, including the right to freight as incident to the property in the ship, the right of the assured to recover damages against a third party stands on a different footing: it does pass to the insurers, but on a different principle; for it passes to him whether the loss be total or partial, whereas in case of partial loss the property in the thing insured does not pass. This passing of the right to recover damages "could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated to the person whom they had indemnified

(*e*) *Simpson* v. *Thomson*, 3 Ap. Ca. 279, at 284.

in his personal rights from the time of the payment of the indemnity" (*f*).

§ 216.—Thus we are led to the question whether, in case the indemnity paid by the insurer is a limited, partial, or incomplete indemnity, the insurer's right of subrogation ought to be subject to corresponding limitations.

The only form in which this question has as yet come before the Courts is the following :—A ship, having been seriously damaged by collision, had been abandoned to the underwriters on ship, who had paid a total loss. The underwriters on chartered freight, a distinct policy, had also paid a total loss. "Thereupon, or afterwards, or before, it seems to me immaterial which," says Brett, M.R., the owner of the ship sued the owner of the other ship with which she had come into collision, and recovered the value of the ship and also the amount of the chartered freight. The underwriters on ship, on the ground that the abandonment had passed to them the freight, claimed to be entitled to the whole sum recovered from the wrongdoer, in respect of the freight as well as the ship. The Court decided, however, that they were only entitled to the portion allotted in respect of the ship; the portion applicable to freight belonging to the underwriters on the freight. What is recovered in respect of freight is to be regarded, it was said, as a salvage on the contract of affreightment, and the contract of affreightment is no part of, nor even a necessary incident to, the ship. Properly speaking, the existence of such a contract cannot be said to enhance the value of the ship, at least for insurance purposes (*g*).

§ 217.—In the case of partial damage to a ship by collision, where there has been a payment of the loss by the underwriter of the damaged ship, and also a recovery

(*f*) S. C. at 292–293.

(*g*) *Sea Ins. Co.* v. *Hadden*, Court of Appeal, March 13, 1884.

of damages from the wrong-doer, the owner of the other ship, this question of partial or entire subrogation arises in the following form. The shipowner has recovered from his underwriter an indemnity which is imperfect, partly avowedly so, partly so in fact but not in theory. That is to say, whereas his actual loss by the collision is composed of the cost of repairing together with the loss of the ship's employment whilst under repair, he recovers from his underwriters nothing in respect of the latter item, this being regarded as a mere indirect or remote consequence of the damage. Besides this, he does not (unless by a special clause in the policy) recover the entire cost of the repair, but two-thirds only: this, however, on an assumption, rarely borne out by the facts, that one-third of the cost of repairing may be taken as representing actual improvement. In these two ways the indemnity given by his policy is limited or imperfect. But his recovery from the wrong-doing ship is not thus limited. He recovers, not two-thirds only, but the entire cost of repairing the damage done to the ship by the collision; and, in addition, he recovers, under the name of demurrage, a compensation for his being deprived, while his ship is laid up repairing, of her profitable services.

In this state of things, the practice is, or has been, to divide the amount thus recovered from the wrong-doer rateably between the owner and his insurers, in the proportion which the limited indemnity given by the latter bears to the more complete indemnity furnished by the wrong-doer. In other words, the sum paid by the latter as damages in respect of demurrage, and in respect of the owner's one-third of the cost of repairing, is retained by the owner, who has in fact sustained these losses, and not taken by the insurers, who have not sustained them. The result is that, supposing a correct adjustment of the claim on the policy in the first instance, and afterwards a complete recovery of damages from the offending vessel,

there will be refunded to the insurer the exact sum which he has paid, and no more.

That this result is fair and reasonable, cannot, I think, be denied. But some doubts have been thrown on its legality, particularly with regard to the deduction of one-third. The right an underwriter has, on payment of the loss, to be subrogated to all the remedies and rights of the assured for the recovery of such loss, is, it is said, complete and absolute. If the property is fully insured, the assured is estopped from contending that the indemnity given by the policy is incomplete, and under that excuse withholding from his insurers any portion of what he has recovered from any third party in satisfaction of the same loss. "The doctrine is well established," says Brett, M.R., ". . . . . that after the assured has been paid by the insurer for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against" (*h*). The assured has been indemnified according to the terms of the policy, and he has consequently changed places with the underwriter as regards claims upon third persons. Perhaps, indeed, a distinction may be drawn between the demurrage and the one-third. The insurer does not profess to indemnify for loss of time, and therefore may not be entitled to the indemnity which has been recovered from a third party under that head. But for the cost of repairing the ship he does profess to indemnify, and to indemnify completely; for he maintains that, in theory, two-thirds of the sum expended in repairing is a complete indemnity for the damage sustained by the ship. Whatever, therefore, is recovered from a third party in respect of damage

(*h*) *Darrell* v. *Tibbitts*, 5 Q. B. D. at 563.

suffered by the ship ought, it is argued, to be refunded to the insurers by whom the ship has been fully insured.

To all this it is answered: the fatal objection seems to be that, if this reasoning is sound, the insurer and assured cease to be one, in the sense intended by Buller, J., in *Mason* v. *Sainsbury.* It no longer is immaterial, as in the opinion of Brett, M. R., it should be, whether the proceedings against the faulty ship are taken before or after the recovery from the insurers. Insurer and assured now enter into a competition of conflicting interests: the assured will dread, as a source of danger, a recovery from his insurers until he has first exhausted every other possible remedy; whereas hitherto this double or alternative right of first claiming under his policy has been regarded as purely an advantage; as, under a contract of indemnity, it obviously ought to be. The insurer's right of subrogation is founded on the circumstance that he has paid to the assured that which the assured has again recovered, or is entitled to have recovered, from some one else: so far as the insurer has *not* paid it, that reason does not apply. The law gives to a shipowner, whose vessel has been damaged by the fault of those on board another ship, a *restitutio in integrum;* that is to say, the entire cost of the repairs, *plus* a compensation for loss of time; and this he can recover, if he pleases, by proceeding against the wrong-doer in the first instance. It would be an entire novelty in the practice of marine insurance, if the privilege he has of going in the first instance to his underwriter should—not here and there by the accident of an under-valuation, but always and as a matter of course—become a pitfall to him, depriving him of a portion of the indemnity he would otherwise have received and at the same time enabling the insurer to make a very illegitimate profit, recovering from a third party more than he had paid.

This, however, must for the present be left as a disputed

question ; there is no decision upon it, and the opinions of the most qualified judges appear to be divided.

§ 218.—Another form of that which is in principle the same question has reference to policies on merchandize.

When goods are damaged, and the insurers have paid for the damage as particular average, the same damage may likewise be recoverable, either as general average—as in the case of goods damaged in effecting a jettison or extinguishing a fire ; or from the shipowner or some third party—as in the case of goods damaged through faulty navigation. What is paid by the insurer as particular average may not be, indeed in theory never can be, the full amount of the damage suffered by the goods : what is paid in general average or by the wrong-doer always, in theory, is the full amount of such damage. The latter is computed by deducting the net amount which the damaged goods have realized, after abating freight and charges, from the net amount which, with the corresponding abatement, the same goods would have realized had they been sound; which difference is the true measure of the merchant's actual loss. The amount payable by the insurers, on the other hand, is a certain per-centage on the value in the policy, arrived at by a comparison of the *gross* proceeds of sound and damaged; a mode of computation which, as has been already explained (*i*), must always (unless balanced by counteracting accidental circumstances) give too small a per-centage of depreciation.

Here, as in the preceding case, the law and practice is not yet settled. Some contend that in such a case the insurer is only entitled to such a proportion of the sum recovered as general average or from the shipowner as the amount which he himself has paid towards the merchant's loss bears to the entire amount of that loss. Others contend that he is entitled to the whole. Whatever the rule is to be, it seems clear that the same principle ought to govern both these cases,—ships as well as goods.

(*i*) *Ante*, § 163.

APPENDICES.

APPENDIX A.

Oldest Extant Form of Policy.

THE "Statute of Florence," of January 28, 1523, ordains: (Art. 1), that "Every person of whatever condition or quality who shall henceforth, within the jurisdiction of Florence, make insurance against the maritime risks he runs or may run on any kind of merchandize, specie, or other goods, shall only do so in conformity with the tenor of the general and universal policy actually in use, without any addition to it: if, however, he shall require to stipulate for some condition not contained in the said policy, he may do so with permission and authorization of the five deputies, but not otherwise" (*a*).

Form of Policy referred to above (*b*).

Sia noto et manifesto ad ogni persona, come *tale* di *tale* si fa assicurare sopra *tal* mercanzia a lui attenente, o di altri suoi amici, o a chi altri attenesse cariche, o per chi caricasse a tal porto, o piaggia di tal luogo per le mani del tale, o per sua commissione, o perchè altri le caricasse in nome del prenominato tale, o in qualunque altro nome segnato o non segnato sopra la nave nominata *tale*, o come nominata fosse padroneggiarsi. Pigliamo le dette sicurtà da chi cariche saranno, o fosse detta mercanzia in tal luogo in sulla detta nave per insino a tanto

Be it known and made manifest to all persons, that of makes assurance on , merchandize belonging to him or his friends, or to whomsoever the same may belong, laden or to be laden for [such or such a port or roadstead in such a place] by the hands of , or his agent, or although others have laden it in the name of the aforesaid , or in some other name designated or not designated on board the ship named , or howsoever named, commanded by . We begin the said insurance from the time when the said goods shall be, or shall have

(*a*) 4 Pard. 598.

(*b*) 4 Pard, 605.

che la tal mercanzia sarà discaricata in terra, o salvamento al tal luogo, potendo detta nave toccare in qualunque altro luogo, et navigare innanzi, o indictro, a destra, et a sinistra, a piacimento del padrone, et far tutti i suoi bisogni ; Correndo sempre rischio detti assicuratori in sulla detta mercanzia d'ogni caso di mare, di fuoco, di getto di mare, di rappresaglia, di ruberia di amici, di nemici, et d'ogni altro caso, pericolo, fortuna, disastro, impedimento, caso sinistro, ancorchè non si potesse immaginare, o pensare che intervenisse, o fusse intervenuto a dette robe, di baratteria di padrone, salvo di stive, o dogana. Tutti li corrono e tutti li portano detti rischi li detti assicuratori sopra di loro per insino a tanto che la detta roba sarà discaricata in terra a salvamento in *tal luogo*, et non si caricando gli assicuratori debbano ritenere uno e mezzo per cento.

Et se della detta mercanzia ne intervenisse, o fusse intervenuto alcuno disastro, che Dio ne guardi, gli assicuratori debbano pagare a detto *tale* quei danari assicurati fra due mesi dal dì della novella infra città.

Et si fra mesi sci non ci fusse vera novella, gli assicuratori debbano pagare a detto *tale*, quei danari assicurati ; et ginguendo dipoi, et scaricando in terra a salvamento in detto luogo li detti debbano rendere a ciascuno quei danari avessero ricevuti. Venendo caso di naufragio si possino recuperare senza licenza degli assicuratori, dichiarando che gli assicuratori non sono obbligati se

been, laden on board the said ship in [such a place], to continue until the said merchandize shall be discharged on land or in safety at [such a place], with liberty for the ship to touch at any other place, and to navigate forwards or backwards, to the right hand or the left, at the pleasure of the captain, and as he may require : The said assurers taking upon themselves in respect of the said goods the risk of all perils of the seas, fire, jettison, reprisals, robbery by friend or foe, and every other chance, peril, misfortune, disaster, hindrance, misadventure, though such as could not be imagined or supposed to have occurred, or be likely to occur, to the said goods, and barratry by the master, except as to stowage or custom-house. All the said risks the said insurers are to run and take on themselves until the said goods shall be safely discharged on shore at [such a place] ; and if they are not laden, the insurers are entitled to retain one and a half per cent.

And if the said goods shall sustain, or have sustained, any disaster (which God forbid), the insurers shall pay to the said the sum insured, within two months from the news reaching the City.

And if within six months there shall have been no true news, the insurers shall pay to the said the sum insured ; and in case of subsequent arrival and safe discharge at the said place, the aforesaid shall pay back to each the sum he has received. In the event of shipwreck, it is allowed to make reovery without authority from the nsurers, it being stipulated that the

il padrone di detta nave furasse cosa alcuna.

said insurers are not responsible for theft by the captain of the said ship.

Et debbano gli assicuratori prima pagare alli detti quei danari assicurati, dipoi litigare. Et loro sodare per sufficienti mallevadori, uno o più a dichiarazione dei cinque offiziali sopra le sicurtà deputati, et rendere a ciascuno quei danari avessero ricevuti, con danno di venti per cento. Gli assicuratori tempo diciotto mesi a provare.

And the insurers are bound first to pay to the aforesaid the sums insured, and to litigate afterwards. And these are to bind themselves by sufficient sureties (one or more as directed by the five official deputies on insurance) to pay back to each insurer the sums they have received, with damages of twenty per cent (*c*). The time allowed to the insurers for proving is eighteen months.

Et per ciò osservare, gli assicuratori obbligano a detto *tale*, loro, e loro eredi e beni presenti et futuri, sottomettendosi all offizio prenominato, et ad ogni altro giudizio et corte, dove il detto *tale* gli volesse convenire.

To the observance of this the insurers bind themselves to the said , themselves, their heirs, and goods present and future, submitting themselves to the office aforesaid, and to every other judgment and Court, whither the said shall please to summon them.

APPENDIX B.

Total Loss of Part.

Mr. Arnould says that "where a cargo is made up of separate packages, capable of distinct valuation in the outset, and the insurance appears from the terms of the policy to be separately effected on each distinct package, in such cases there can be little doubt that the loss will be treated as a total loss" (*d*).

(*c*) "This appears," says Pardessus, "to have been a species of penalty, in case the underwriter shall succeed in proving that the payment of the sum insured has been improperly demanded; which could hardly be except in the event of some default or fraud on the part of the assured." (4 Pard. 607.)

(*d*) Arn. Ins. 1059 of 2nd edit., 976 of 5th ed.

The proposition thus cautiously worded may be perfectly true, and yet it may be an error to suppose that the mere circumstance that each package is separately valued would constitute a separate insurance on each package. A careful examination of the authorities will show that the point raised in the text,—whether if some out of more packages of one commodity be wholly lost, this would be claimable as a total loss in case the packages were separately valued in the policy (§ 216),—not only has not been expressly decided, but is hardly, if at all, touched by the various dicta of the judges. These dicta go no further than to establish the very different proposition laid down by Mr. Arnould. In *Ralli* v. *Janson*, Jervis, C. J., says: "The fact of the cargo being in bags only renders it more practicable to value and insure each bag-full separately; but, *in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally as well as the whole jointly*, it does not of itself show that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag" (*e*). This judgment in Exchequer Chamber, expressly overrules *Davy* v. *Milford* (*f*), and condemns, as the error of a reporter, what Lord Abinger is supposed to have said in *Hills* v. *London Ass. Co.* (*g*). In *Entwisle* v. *Ellis* (*h*), where the very point now before us seemed to be raised, although the decision went on another ground, the judges carefully abstained from pronouncing an opinion that a separate valuation would have the effect supposed; indeed, Bramwell, B., rather implied the contrary, saying, "I doubt, too, whether, if this declaration"—the separate valuation of 8*s*. 3*d*. per bag—"had been inserted in the body of the policy, it could be construed as anything more than a mode of showing how the value was calculated" (*i*).

The American law on the point is summed up by Mr. Phillips as follows:—"Whatever may be the doctrine in Eng-

(*e*) 6 E. & B. 422, at 429.

(*f*) 15 East, 559; overruled, 6 E. & B., at 442.

(*g*) 5 M. & W. 569, at 576; corrected, 6 E. & B., at 436 and 442.

(*h*) 2 H. & N. 549.

(*i*) 2 H. & N., at 555.

land, there is no question that in the United States the assured has no claim under this exception" [free of particular average] "on account of a partial destruction of the value of the article, or the destruction of part of the article, whether it may have been in bulk, or in separate parcels or packages, *unless the policy indicates that a loss is to be adjusted on different parcels or divisions*" (*k*).

Thus we are brought to the question, whether a distinct valuation of the article insured at so much per bale or package is to be taken as indicating an intention to treat each package as if separately insured.

There is, in the first place, nothing in the words themselves which, apart from custom or a general understanding, would carry that meaning. A separate valuation is on the face of it nothing but an agreement that the value of each several package shall be taken as so much,—an agreement very convenient for avoiding dispute and facilitating an adjustment. Is there, then, any custom or general understanding importing a meaning not obvious on the surface, viz., that a distinct valuation constitutes a separate insurance? Custom, in this direction, there is none: before *Ralli* v. *Janson* such total losses of part were paid without distinction, whether the goods were valued in the lump or in detail; since *Ralli* v. *Janson* such losses have in either case been in practice excluded; so that there never has been a time when the suggested distinction has been acted on in practice. As to a general understanding, that is certainly the other way; as is proved by the fact that whenever it is intended to divide the subject-matter of insurance into parcels, each of which shall be treated as a distinct insurance, this is done by means of special clauses called "average clauses." In insuring cotton, for example, the usual course is to value it in the policy at so much a bale, and to insert the clause "average on each ten bales running numbers, as if separately insured." This clearly implies an understanding that, though each bale is valued separately, the question of average or total

(*k*) § 1773, p. 443.

loss must be dealt with by a reference to the whole, unless this rule be relaxed by an average clause.

Neither the grammatical construction of the words, then, nor any usage or understanding, carries the wider meaning contended for.

APPENDIX C.

Effect of Loss of Voyage.

It may be thought somewhat startling to maintain (§ 218) that goods which are sound, and may fetch a fair price at the port of refuge, may, merely because they cannot be forwarded to their destination, be for insurance purposes considered as totally lost. Must there not be something wrong in reasoning which leads to a conclusion apparently absurd?

It may at once be acknowledged that the English law as to total loss would be more self-consistent (*a*), and if one dared to say so, more conformable to the good sense at least of mercantile men, if it could once for all sweep away the doctrine that a loss of the voyage, while the goods remain in specie, and are of some value somewhere, can amount to a total loss of the goods (*b*). Is not the doctrine itself a relic or survival of the old notion that insurance is in its nature a sort of wager? It is not easy on any other hypothesis to account for this doctrine. The argument on which it is ordinarily based seems to be insufficient on the surface. That argument, as given for instance in Lord Abinger's judgment in *Roux* v. *Salvador*, amounts simply to this, that what is insured is not merely the goods but likewise the performance of the voyage. "The object of the policy," says the learned judge, "is, to obtain an indemnity

(*a*) Since the doctrine as to loss of voyage is at present applied to merchandize only and not to ships.

(*b*) The law in the United States is stated to be, that the mere loss of the voyage does not in any case by itself render a loss total: for this purpose there must be either an entire destruction of the goods, or an entire change of species (Arn. Ins. 1041 of 2nd edit.).

for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination" (c). Granting this, does it follow that if *this* object of the policy is frustrated, the loss to the assured must necessarily be treated as if total? Are there not really two objects of insuring,—the physical safety of the goods, and likewise their reaching their destination? If the goods are actually destroyed, both these objects are frustrated: but if the goods are in physical safety, and within the control of the assured, but cannot reach their destination, one object only is frustrated, the other is secured,—wholly secured, if the goods are sound, partially secured if they are damaged. It is as though two things were insured in one policy, and one of them were destroyed and not the other: there might be some reason for saying there was a total loss of one, but not of both.

Can it then be argued that so firmly-rooted a doctrine of English law as this, that an inevitable loss of the voyage constitutes a total loss under a cargo policy, ought to be given up? At least the writer of an elementary treatise, whose business is merely to state as well as he can what the law is, may fairly say that such a speculation is entirely out of his province. To say nothing of other authorities, the judgment of the Court of Exchequer Chamber, in *Roux* v. *Salvador*, acted on without question for half a century, seems to be conclusive on the point.

It has been suggested, however, that this judgment must not be extended beyond the circumstances of the particular case it dealt with. In *Roux* v. *Salvador* (d) the goods were sea-damaged, and so badly seadamaged that, even if they could be carried to their destination, they could not have arrived there without a change of nature, so that they would not have been the same merchandize, nor indeed merchandize at all. To apply the same rule to goods which are sound, is to go further than the precedents carry us,—and further in a wrong direction (e).

(c) *Roux* v. *Salvador*, 3 Bing. N. C. 266, at 278.

(d) 3 Bing. N. C. 266.

(e) See, however, as against this, *Rodocanachi* v. *Elliott*, L. R. 9 C. P. 518, and particularly what is said by Bramwell, L. J., at 522.

It is quite possible, perhaps not unlikely, that if the question is brought in this shape before the Courts of law, they may draw a distinction between goods which are sound, or, if damaged, not so damaged as to have any unfitness *in themselves* for being carried on, and goods in the condition above described. Some faint indications of a disposition to draw such a distinction may here and there be observed in recent dicta of judges. All that I have said in the text amounts to this, that it will be difficult to find a logical basis for such a distinction. If sound goods which can by no possibility be carried to their destination are not totally lost, how can it be maintained that damaged goods, which in like manner cannot be carried on, yet are of some value to the owner where they are, are totally lost? If the loss of voyage is not by itself a ground for pronouncing the loss total, what other ground is there? In fact, what difference is there, as respects the totality of the loss, between the two cases? In both alike, the assured suffers or may suffer a pecuniary loss, from the necessity of selling the goods in a market for which they were not intended. If the goods are damaged, the assured suffers a further loss by reason of that damage. But this further loss, which must now be looked at by itself, since it is the only difference and ground of distinction between the two cases, is not total, since the damaged goods are of some value. The choice lies, then, between being illogical—which in a scientific system of law is a great evil, and either a radical change in the law, or an acceptance of the, no doubt paradoxical, extension of it to the case of goods which are sound.

APPENDIX D.

Customary Average Clauses.

Alkali—Each 10 casks.
Arrowroot—Each 20 barrels or 50 tins.
Cassia Vera—Each 60 packages.
Camels' Wool—Each 5 bales.
Cattle—Live-stock clauses—
Including all risk of shipping and until safely landed.
Against all risks including mortality and jettison arising from any cause whatsoever.
Animals walking ashore, or, when slung from the vessel, walking after being taken out of the slings, to be deemed arrived, and no claim to attach to this policy on such animals.
Each animal to be deemed a separate insurance.
(There are several variations on this clause.)
Cigars—Each case.
Cinnamon—Each 5 bales.
Cochineal—Each bale.
Coffee—Every 10 hogsheads and tierces, 20 barrels and 50 bags running landing numbers.
—— (London to Mediterranean)—Each valuation, or 5 casks or 20 bags.
—— (from Java)—Each 25 bags (3 per cent.).
—— (Brazils to United States)—Each 250 bags (5 per cent.).
Coir rope, Coir yarn, and Coir fibre—Every Rs. 1000 value (5 per cent.).
Corn—See *Grain*.
Cotton—Every 10 bales running landing numbers and on pickings without reference to series or percentage.
Cotton seed cake—F. P. A. under 10 per cent. on the total interest (American).
Fish Oil—Each cask.
Flax and Hemp—Each interest mark or quality (or each 5 tons or 20 packages).
Flour—Every 100*l.* value. (This means *sago* flour).
Gambier—On every $500 value (5 per cent.). Each 50 packages, or 100*l.* value.
Ginger—Every Rs. 1000 value running landing numbers (5 per cent.).
Goods (*Manchester*)—Each package.
Grain—F. P. A., but to pay warehousing, forwarding, and other special charges, as well as partial loss arising from transhipment.
Guano—As in Grain, adding "warranted free from all claim for jettison" (and, sometimes, "or the consequences thereof").
Hemp—Each mark or quality, or on each 5 tons as raised from the ship's hold (or, every 10 bales, running landing numbers).
—— (*Russian*)—On each interest, mark, or quality, or on every 5 tons or 20 bales as landed, and on pickings without reference to series or percentage (5 per cent.).
Hides—Each 1000 hides, 10 per

cent., or warranted F. P. A., unless the vessel be stranded, sunk, or burnt, but to pay the expenses of washing and drying if damaged by sea water, and the same amount to 5 per cent. (or F. P. A. under 10 per cent. on each 1000 hides).

Hops—Subject to 10 per cent. particular average.

Indigo—Each package.

Jute—Each 50 bales.

Lac Dye —Each package.

Leather—Each bale, subject to 5 per cent. particular average.

Linseed—Every Rs. 1000 value running landing numbers.

Live-stock—See *Cattle*.

Meat—The following clause is sometimes inserted :—F. P. A., &c., but, in case of the prolongation of the voyage after fourteen days, to pay for any damage to, or deterioration of, the meat.

Mohair—Each bale.

Myrabolams—Each 100 bags (or, every Rs. 1000 value) (5 per cent.).

Nux Vomica—Every 100*l.* value (5 per cent.).

Olive Oil—Every 5 tuns, and for each mark separately.

Opium—Each package.

Palm Kernels—Every 8 tuns running landing numbers.

Palm Oil—Every 3 tuns or 5 casks running landing numbers.

Paper—Each 5 packages (10 per cent.) (or, if in tin, each package).

Pepper—Each 50 bags.

Petroleum—(Antwerp Clause)—Free from claim for leakage unless caused by stranding, collision, or the forced discharge of cargo at an intermediate port of distress, and said leakage amounts to 3 per cent.

Pimento—Every 10 bags running landing numbers.

Rape Oil—Each 5 tuns.

Rape Seed—Each 500 bags running landing numbers (5 per cent.).

Rice (from Calcutta)—Each 500 bags (or, each 100 bags).

—— (outwards, if cleaned)—Each 50 bags.

Rum—Each mark or interest.

Safflower—Each 10 bags.

Sago—Each 20 boxes.

Sago Flour—Every $500 value (10 per cent.).

Saltpetre—Each 100 bags.

Seed—See *Grain*.

Senna—Each 5 bales.

Sheep—See *Cattle*.

Sheepskins—Each bale.

Shellac—Each package.

Ship (*Wooden*)—Warranted F. P. A. below the load water line (*a*), unless caused by *injury to the stem or sternpost* (*b*), fire, grounding, or contact with some substance other than water (*c*).

(*a*) Very frequently, of late, "below the *marked* load line ;" a great improvement in the case of British ships, but useless for foreign ships. Other variations are, "below water," and "below the water line." All these variations have, under some circumstances, different effects.

(*b*) These words are often omitted.

(*c*) It is very usual to add a clause providing that thirds are not to be deducted, in the case of British-built ships, until eighteen months old : in the case of foreign-built ships, until twelve months old.

Ship (*Iron*)—Until eighteen months old: in the case of foreign-built ships, until twelve months old.

Liverpool clauses:—

No thirds to be deducted from repairs of ironwork of hull, masts, or spars; or, in the event of claim, no thirds to be deducted from the cost of repairs.

Glasgow clause:—

On ships up to two years old, calculated from date of registry, no one-third new for old to be deducted from cost of repairs; on ships above two years old no one-third new for old to be deducted from ironwork repairs.

London has no settled custom, so far as I can ascertain.

In addition to the clauses given above, there are the following, which are not unfrequently used:—

No thirds off *ironwork repairs.*

No thirds off repairs *of* ironwork.

No thirds off repairs *to* ironwork.

And, no thirds off repairs *in* ironwork.

Perhaps the latter clause has, as it is intended to have, a more restricted meaning.

The effect of the usual Club Clauses for iron vessels, whether ships or steamers, is:—On ships up to one year old, no one-third to be deducted except off painting or coating of bottom; after that age boilers, machinery, sails, spars, rope, woodwork, &c., to be thirded. Repairs to hull to be allowed in full up to three years old; after that period a deduction of one-sixth, and after six years a deduction of one-third to be made (sometimes the periods are six years and ten years respectively). No painting or coating of bottom to be allowed if it has been on the ship six months.

Silk—Each package.

Soda—Each 10 casks.

Steamer—On ship valued at £ viz.:—

	£
On hull and materials valued at	
On machinery and boilers and everything connected therewith, valued at . .	
	£ (*a*)

To pay average on each valuation separately, without deduction of one-third (*b*).

Sugar (outwards)—Each valuation (or 5 casks or 20 bags).

—— (homewards)—Every 10 hogsheads, 20 barrels, 10 cases, or

(*a*) The separate valuations are sometimes increased to three, and in the case of heavily valued steamers, to four. The four valuations are:—(1) Hull, &c.; (2) Masts, spars, boats, sails, ropes, stores, &c.; (3) Cabins, deckhouses, and furniture; (4) Machinery, boilers, and everything connected therewith.

A fifth valuation even has been introduced in some very exceptional cases, covering separately the deck machinery, such as steam-winches, donkey-engines, &c.

Sometimes the real object of these subdivisions is attained by a clause providing that average is to be paid if amounting to a certain sum. This certainly has the merit of simplicity.

(*b*) The club clause is given above, under the head of Iron Ships.

50 bags, running landing numbers.

Tea—Average payable on every 10 chests, 20 half chests, or 40 boxes running landing numbers; but no claim to arise for wet or damp in respect of any chest or other package, unless the tea therein contained shall have been in actual contact with sea water.

—— (Indian)—As above, adding "or river water."

Timber—See *Wood Goods.*

Tobacco—Every 10 hogsheads. (Frequently, in the event of claim, to pay the excess only of 5 per cent.).

Turpentine (Antwerp Clause)—Free from claim for leakage unless caused by stranding, collision, or the forced discharge of cargo at an intermediate port of distress, and said leakage amounts to 3 per cent.

Wheat—See *Grain.*

Wood Goods—On the separate valuations of in and over. Each raft or craft to be deemed a separate insurance.

Wool (Mediterranean or Black Sea)—Each 5 bales.

—— (Colonial)—Each bale.

—— (River Plate)—Each 5 bales.

—— (East Indian)—Every 10 bales running landing numbers.

—— (South American—West Coast)—Each bale.

—— (Australian)—Each bale.

Other Produce, not specified above—

A sort of general rule is to make up such a number of packages as will give a value of about 100*l.*, as the basis of a series.

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THE END.

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